Declaratory Judgments in the Federal Courts

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A bill is pending in Congress to revise, codify and enact into law title 28 of the United States Code entitled "Judicial Code and Judiciary." Chapter 151, sections 2201 and 2202 deal with Declaratory Judgments. The following is a copy of the Act of 1934. The portions omitted by the pending bill are italicized and the changes and additions are in bold type.

"(1) In case of actual controversy **within its jurisdiction** except with respect to Federal Taxes *the courts* **any court** of the United States *shall have power upon petition, declaration, complaint or other appropriate pleadings to declare rights or other legal relations of any interested party petitioning for such declaration,* **upon the filing of an appropriate pleading, may declare rights and other legal relations of any interested party seeking such declaration,** whether or not further relief is or could be *prayed* **sought,** *and* **any** such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such."

"(2) Further **necessary or proper** relief based on a declaratory judgment or decree may be granted *whenever necessary or proper.* **After reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment."** *"The application shall be by petition to a court having jurisdiction to grant relief. If the application is decreed sufficient, the court shall on reasonable notice, require any adverse party whose rights have been adjudicated by the declaration, to show cause why further relief should not be granted forthwith."*

"(3) *When a declaration of right or the granting of further relief based thereon shall involve the determination of issues of fact tryable by jury, such issues may be submitted to a jury in the form of interrogations, with proper instructions by the court, whether the general verdict be required or not."*

It is manifest that the original act will be greatly shortened and simplified if the proposal is passed. This accords with the policy of Congress in this matter. It has been content to pass a simple enabling act conferring upon the federal courts jurisdiction to issue declaratory judgments without the detailed enactment found in the

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Uniform Declaratory Judgment Act. It is believed that the proposal, if it becomes law, will not appreciably modify the procedures that have been established under the Act of 1934.

The purpose of this article is to consider the work of the federal courts, chiefly at the trial level, and to ascertain the difficulties met by those courts in cases brought under the statute. All of the cases have been examined but only those manifesting difficulties have been considered herein. The chief difficulties seem to present themselves in the following topics; Nature of the Remedy, Exercise of Discretion, the Existence of a Controversy, Jurisdictional Amount of Controversy, Another Pending Suit, Exhaustion of Statutory Remedies, and Contingent Interests and their effect on Determination of a Controversy.

VALIDITY

The frequency of the use and the extent of the scope of the declaratory judgment procedure in the federal courts today was in no way indicated by its very stormy, though short, history. Although equity courts had long made use of the technique of a declaration of the rights of the parties to a controversy under its consideration,[1] the Supreme Court manifested a strange opposition to its use as a form of relief in the federal courts. Requests for declarations were erroneously treated as petitions for advisory opinions, or considered as involving hypothetical or moot cases and hence not within the jurisdiction of federal courts because they did not satisfy the Constitutional provisions which conferred power on the courts in cases and controversies only.[2] This intolerance toward the declaratory device was carried to such extremes that the Supreme Court held that it could not review a case on appeal from a state court brought under the state declaratory judgment act.[3] In another case it was strongly intimated that a Congressional act conferring such jurisdiction would be unconstitutional.[4]

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[1] Sharon v. Tucker, 144 U.S. 533 (1892) and see Mr. Justice Stone's opinion in Nashville, Chattanooga & St. Louis Ry. v. Wallace, 288 U.S. 249 (1933).

[2] U. S. CONST. Art. III, § 2; Liberty Warehouse Co. v. Grannis, 273 U.S. 70 (1927) ("The sole purpose of the petition . . . is to obtain a declaration. . . . There is no semblance of any adverse litigation.").

[3] Liberty Warehouse Co. v. Burley Tobacco Growers Co-op Market Assoc., 276 U.S. 71 (1928) ("This court has no jurisdiction to review a mere declaratory judgment.").

[4] Willing v. Chicago Auditorium Assoc., 277 U.S. 274 (1928) ("What the plaintiff asks is simply a declaratory judgment. To grant that is beyond the power conferred upon the federal judiciary . . . the proceeding is not a case or controversy within the meaning of Article III of the Constitution." In his concurring opinion Stone, J. suggested that this was, in effect, giving a declaratory judgment.); See also Piedmont & Northern Ry. v. U.S., 280 U.S. 469 (1930).

It is not the purpose of this paper to discuss the constitutional problem, now well-settled and elsewhere so fully treated.[5] It should be pointed out, however, that many of the doubts created by this attitude were resolved in the *Wallace* case[6] in which the court did review a declaratory judgment rendered by the state court based upon the state declaratory judgment statute. In that case the court found that a genuine "case or controversy" did exist, the presentation of which, though not in traditional form, was sufficient to meet the constitutional requirement. Therefore, the court upheld the validity of the state statute which authorized such an unconventional presentation of the matter. Nevertheless, some doubt seemed to linger in the minds of some of the judges. This doubt was indicated in 1934, the year that Congress passed the Federal Act authorizing the use of declaratory judgment procedure, when the Supreme Court linked such a judgment with an advisory opinion and held it inadequate to meet the test of a "case or controversy."[7] Perhaps it was because of this decision and the dictum contained in the opinion that the "case or controversy" concept was re-examined with great care by Chief Justice Hughes in an early case brought under the new federal statute to test its validity.[8] The *Haworth* case presented the issue in the form of a request by the insurance company for a declaration of non-liability under a policy of insurance. Both the district court and circuit court of appeals[9] found that "There was only a potential, a possible future controversy, but no present actual controversy." The Supreme Court reversed the holding and set at rest, so far as the Federal courts were concerned, the constitutional question by upholding the validity of the Federal Act. The court interpreted the phrase, "cases of actual controversy," the statutory prerequisite for the rendition of a declaratory judgment, by explaining that "the word 'actual' is one of emphasis rather than definition. Thus the operation of the Declaratory Judgment Act is procedural only." Since procedural changes are not prohibited by the Constitution, the validity of the act was established.

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[5] BORCHARD, DECLARATORY JUDGMENTS, Chapter V (2d ed. 1941); ANDERSON, DECLARATORY JUDGMENTS, Chapter II (1940); Sunderland, *Modern Evolution of Remedial Rights—Declaratory Judgments,* 16 MICH. L. REV. 69 (1917); Borchard, *The Constitutionality of Declaratory Judgments,* 31 COL. L. REV. 561 (1931).

[6] See note 1 *supra.*

[7] Alabama v. Arizona, 291 U.S. 286 (1934) ("This court may not be called upon to give advisory opinions or to pronounce declaratory judgments.").

[8] Aetna Life Ins. Co. v. Haworth, 300 U.S. 227 (1937).

[9] 11 F. Supp. 1016 (1935), *aff'd,* 84 F. 2d 695 (C.C.A. 8th 1936).

NATURE OF THE REMEDY

Under this topic some difficulties are experienced by the courts in seven somewhat disconnected but related matters. They will be presented in the following order: sui generis character, the declaration as alternative relief, prohibition against piecemeal determination of issues, comparison with requirements for injunction, placement of burden of proof, jury trial, and counterclaim for declaration.

The new declaratory judgment procedure created by the Act of 1934 is neither equitable nor legal but sui generis.[10] As described by Rodney, D.J. in a recent case, "A declaratory suit defies any attempt to affix a label indicative of its character as either a legal or an equitable proceeding . . . It is usually denominated as sui generis to indicate it is neither purely legal nor purely equitable."[11] It is a flexible, adaptable and hybrid form of action whose origin has been traced to equity practice, most frequently to quia timet cases.[12] But this origin does not stamp the declaratory relief as equitable. It has been held that, since the declaratory judgment is not a suit in equity, the absence of an adequate legal remedy is not a prerequisite to the granting of a declaration, nor do the technicalities of equity procedure control declaratory judgment suits.[13] Because its character is procedural, its singular nature does not operate to enlarge or alter the jurisdiction of the federal courts.[14] When further coercive relief of an equitable nature is prayed, equitable principles will be employed, but if of a legal character, legal principles control.[15]

One problem which has caused great difference of opinion and conflict in state decisions is whether the declaratory judgment is an

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[10] Great Lakes Dredge & Dock Co. v. Huffman, 319 U.S. 293 (1943); Great Northern Life Ins. Co. v. Vince, 118 F. 2d 232 (C.C.A. 6th 1941), *cert. denied,* 314 U.S. 637 (1941); Pacific Indemnity Co. v. McDonald, 107 F. 2d 446 (C.C.A. 9th 1939); Miller v. Greenville, 138 F. 2d 712 (C.C.A. 8th 1943); American Blower Co. v. B. F. Sturtevant Co., 61 F. Supp. 756 (S.D.N.Y. 1945) (Act is procedural. It does not create new substantive rights in legal relations.).

[11] Buromine Co. v. Nat. Aluminate Corp., 70 F. Supp. 214 (D. Del. 1947).

[12] American Ins. Co. v. Bradley Mining Co., 57 F. Supp. 545 (N.D. Cal. 1944) quoting American Automobile Ins. Co. v. Freundt, 103 F. 2d 613 (C.C.A. 7th 1939); Wallace case, note 1 *supra.*

[13] Bakelite Corp. v. Lubri-Zol Development Co., 34 F. Supp. 142 (D. Del. 1940); *See* American Ins. Co. v. Bradley Mining Co., note 12 *supra.*

[14] See note 12 *supra.* And see Atlantic Meat Co. v. Reconstruction Finance Corp., 166 F. 2d 51 (C.C.A. 1st 1948) (The Declaratory Judgment Act "confers no additional jurisdiction on the district courts but merely adds a new procedural device.").

[15] See note 11 *supra.*

alternative remedy.[16] Most of the federal courts, however, understand and treat the declaratory judgment as another form of relief. Federal Rule 57 provides that: "The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate."[17] The result has been that the scope of the new remedy has become practically as broad as the existence of other remedies.

Because of its alternative status, therefore, a petition for a declaration may also include a prayer for further relief from among the conventional remedies, legal, equitable, or both, in a proper case.[18] It is clear, of course, that additional relief need not be prayed for; a declaration as a sole remedy is authorized by the statute.[19]

However, there are isolated instances where the courts seemingly have trouble with the "alternative" concept of the remedy. A recent case, in particular, stands out for the confusing and erroneous language contained therein, to wit: "The act is not exclusive. It affords an alternative remedy. It provides a remedy in certain controversies where no other remedy is available."[20] This case, decided in 1935, came early in the history of the federal declaratory act when the courts were not quite certain of the part to be played by this new procedural technique. There is no recurrence of this idea and it is believed that the inexperience of the court with a new remedy alone accounts for the questionable statements by the court on its utility.

Courts have often repeated a warning to litigants that declaratory relief is intended as a final determination of issues and should not be considered as intermediate relief, performing a stop-gap function.[21] By the same token, they have tried to educate parties to the realization that a declaration can not be sought for the determination of some of the issues involved in a controversy, while the remaining issues are settled with coercive measures. A declaration of rights is a final adjudication of a controversy, reviewable on appeal or error, which ranks on a par with a permanent injunction

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[16] BORCHARD, *op. cit. supra* note 5, at 315; and see Breese, *Atrocities of Declaratory Judgment Law*, 31 MINN. L. REV. 575 (1947); Duvall, *The Declaratory Action*, 21 TULANE L. REV. 559 (1946-47).

[17] 28 U.S.C. page 2644 (1940).

[18] Miller v. Greenville, note 10 *supra*.

[19] Petrol Corp. v. Petroleum Heat & Power Co., 162 F. 2d 327 (C.A.A. 2d 1947); Ginn v. Biddle, 60 F. Supp. 530 (E.D. Pa. 1945).

[20] Automotive Equipment v. Trico Products Corp., 11 F. Supp. 292 (W.D. N.Y. 1935).

[21] Koon v. Bottolfsen, 60 F. Supp. 316 (D. Idaho 1944); Root v. York Corp., 56 F. Supp. 288 (D. Del. 1944) (Declaration must be a final judgment); Duart Mfg. Co. v. Philad Co., 31 F. Supp. 548 (D. Del. 1940).

or a judgment for damages. Undoubtedly, the fact that a declaratory judgment is an alternative remedy, which may or may not be granted along with coercive relief, has caused the confusion as to its availability as a piecemeal determinant.

That a declaration can not be used where it will not terminate the litigation or bar rights which might thereafter be asserted was ably pointed out in *Koon v. Bottolfsen.*[22] In that case, plaintiffs, suing for a declaration of rights under a contract made with defendants as officers of the state, brought an action against the latter in their individual capacity. The court, in refusing to pass upon the merits of the case and declare the rights of the parties, stated that the action, brought against the improperly-named defendants, could not be maintained. So far as the declaration was concerned, the court ruled that it "should settle the entire controversy; and that cannot be accomplished in the present action."

Similarly, a declaration of liability of a surety on a performance bond, given by a subcontractor to a contractor, was held not to be a "final judgment" because the primary liability of the subcontractor to the contractor had not been first determined.[23] Accordingly, an appeal from such declaration was dismissed as premature, the court ruling that for a judgment which did not determine all the issues involved in an action to be considered "final" and appealable under the Federal Rules, it must make a final disposition of a claim separate and apart from all other claims involved. Thus, if the declaration did not settle the "transaction or occurrence" which was the subject-matter of the declaration, it was not a final declaratory judgment but an unorthodox attempt to try a case piecemeal.

Under the Code of Civil Procedure, great flexibility has been achieved in dealing with this principle. Thus, where a plaintiff, an accused patent infringer, petitioned for a declaration of the invalidity of defendant's patent and non-infringement by the plaintiff, and for an injunction against threatened infringement suits, to which action the defendant interposed a legal counterclaim for damages, there were obviously many issues involved. Some were to be tried by a jury and some by the court. The court, however, denied a motion for separate trials, saying, "No separate trial is

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[22] See note 21 *supra.*

[23] Western Contracting Corp. v. National Surety Corp., 163 F. 2d 456 (C.C.A. 4th 1947) (Judge Parker said, "A declaratory judgment is not proper for the purpose of determining in advance the validity of defenses in a pending action or of trying it by piecemeal."); Angell v. Schram, 109 F. 2d 380 (C.C.A. 6th 1940) (Court cannot make a declaration unless it can settle the controversy); Perlberg v. Northwestern Mut. Life Ins. Co., 62 F. Supp. 76 (E.D. Pa. 1945) (Declaration denied if plaintiff has power to make it academic.).

necessary and the court can within its equity power grant the equitable remedy upon the testimony produced at the jury trial."[24] Thus all of the issues would be disposed of and piecemeal adjudication avoided.

In a case in which a declaration and an additional request for damages were sought the principle was again approved. The court found that all claims were dependent upon the declaration concerning a single provision of the contract, which had been made by the district court but, for a reason not explained, the court had not yet assessed the damages. It was held that the case was not appealable because the judgment was not yet final. Reliance was placed upon the federal rule[25] which stresses "the transaction or occurrence" as the "subject-matter" of the claim, instead of the legal rights arising therefrom.[26] The court seemed to be on very doubtful ground, however, when it suggested that "the mere fact that different claims are made arising out of this one contractual provision is not sufficient separation of the 'causes' so that *piecemeal appeal* is permissible." This suggestion of "piecemeal appeals," implying the validity of "piecemeal actions," seems to be a direct refutation of the general prohibition against the latter practice.

Another departure from the rule is illustrated in the desire of the courts to terminate existing difficulties between the parties before it. As a result of this attitude, one court held that the fact that rights which might subsequently accrue could not be determined in an action for a declaration on an essential matter of construction of a contract did not prevent a present declaration.[27] Thus, if the issues are presently determinable, the acceptance of the case in a declaratory judgment proceeding will give the court power to settle all issues.

Another case which seems at odds with the usual limitation surrounding declaratory judgments is one in which the court assumed jurisdiction of all other issues between the parties by virtue of having acquired jurisdiction over one of the issues.[28] Whether this was done under color of avoiding piecemeal litigation was not pointed out by the court, but if that were the motivating factor, such a result would amount to a real "stretching" of the rule.

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[24] Ryan Distributing Corp. v. Caley, 51 F. Supp. 377 (E.D. Pa. 1943), *aff'd*, 147 F. 2d 138 (C.C.A. 3d 1945), *cert. denied*, 325 U.S. 859 (1944).

[25] 28 U.S.C. Rule 54 (b).

[26] Petrol Corp. v. Petroleum Heat & Power Co., 162 F. 2d 327 (C.C.A. 2d 1947).

[27] Dunleer Co. v. Minter Homes Corp., 33 F. Supp. 242 (S.D. W. Va. 1940).

[28] Albuquerque Broadcasting Co. v. Regents of New Mexico College of Agric. & Mech. Arts, 70 F. Supp. 198 (D. N. Mex. 1945), *aff'd*, 158 F. 2d 900 (C.C.A. 10th 1947).

In retrospect, the application of this section has been declared to be limited to those controversies which can be effectivly encompassed and determined in a declaration and judgment either ending litigation which might otherwise result therefrom or limiting rights which might thereafter be asserted.

There is evidence of a mistaken view that the jurisdiction of the federal courts in a declaratory proceeding is in some way conditioned upon and controlled by the same considerations which govern a court of equity in a suit for a declaration of an equitable nature. This is particularly noticeable where the equitable remedy sought is an injunction.

In *N. Y. Casualty Co. v. Zwerner,*[29] where the petition sought a declaratory judgment in a tax matter, the court said, "The declaratory judgment act . . . does not bar action by the court in this case, for it has been held by the United States courts that where a third party is entitled to an injunction against the Tax Collector, declaratory relief may also be granted. . . . Furthermore, if the court has the right to grant an injunction, it also has the right by declaratory action to determine the rights of the parties." No unfortunate result would likely follow this affirmative rule: that the existence of jurisdiction to issue an injunction is sufficient to sustain the granting of declaratory relief. On the contrary, the alternative character of the remedy is thereby sustained. But when the opposite, the negative rule, is urged, objection should be noted, for the results of its application are abortive of the concept that this declaratory judgment remedy is alternative.

The negative rule was approved in *State of Wyoming, v. Franks,*[30] where the court refused declaratory relief saying: "The case has been considered primarily under the prayer for injunctive relief, but if considered under the Declaratory Judgment Act, the result must be the same. Where an injunction will not lie a declaratory judgment cannot be substituted for it. Similarly, in *Sellers v. Johnson*[31] the court stated the rule thus: "This court cannot determine the rights of the parties by declaratory judgment in a case where the court must under the situation refuse equitable relief." Both cases rely upon the *Huffman* case[32] in which a declaration of the validity of a state tax was sought. After pointing out the federal policy of hesitation to interfere with state taxing and fiscal matters, Stone, C. J. said: "The Declaratory Judgment Act was

[29] 58 F. Supp. 473 (N.D. Ill. 1944).

[30] 58 F. Supp. 890 (D. Wyo. 1945).

[31] 69 F. Supp. 778 (S.D. Iowa 1946).

[32] Great Lakes Dredge and Dock Co. v. Huffman, 319 U.S. 293 (1943); Watson v. Buck, 313 U.S. 387 (1941); Beal v. Mo. Pac. R. R., 312 U.S. 45 (1941); Speilman Motor Co. v. Dodge, 295 U.S. 89 (1935).

not devised to deprive courts of their equity powers or of their freedom to withhold relief upon established equitable principles." He then referred to the Act of Congress in 1937[33] which forbade district courts to enjoin or interfere with any state tax where "a plain speedy, and efficient remedy may be had at law or in equity in the courts of such state." The same considerations, the Chief Justice maintained, which prompted Congress to limit the district court's jurisdiction in equity "are persuasive that relief by way of declaratory judgment may likewise be withheld in the sound discretion of the court."

The state law involved in this case had provided a statutory remedy, which was considered adequate, but had not been exhausted. The court could have denied declaratory relief for that reason. Justice Stone continued, "For we are of the opinion that those considerations which have led the federal courts of equity to refuse to enjoin the collection of state taxes, save in exceptional cases, require a like restraint in the use of the declaratory judgment procedure."

It seems clear that the *Huffman* case does not hold that the declaratory judgment remedy is not an alternative remedy to the granting of injunctive relief. Nor does it stipulate that the availability of an injunction is a prerequisite to the existence of jurisdiction for a declaratory action. However, the opinion should be interpreted as meaning that, once jurisdiction of a declaratory action has been established, the same considerations of policy against interference with the operation of a state law, which obtain in a suit for an injunction, should prevail in an action for a declaration.

In the recent case, *Eccles v. Peoples Bank of Lakewood Village,*[34] in which it was decided that the case was hypothetical and not ripe for a declaration, there is language which may suggest the objectionable negative rule. Justice Frankfurter said: ". . . as we have seen, the Bank's grievance is too remote and insubstantial, too speculative in nature, to justify an injunction against the Board of Governors, and therefore equally inappropriate for a declaration of rights." It is believed that what is meant is that the same considerations of policy will control the declaration as control the issuance of an injunction, not that the declaration is dependent upon the existence of injunctive relief.

The *Franks* and *Sellers* cases above seem to be stating the rule so as to make the applicability of injunctive relief a requirement for the assumption of jurisdiction, thereby attacking the character of a declaration as an alternative remedy, a concept firmly estab-

[33] 50 Stat. 738 (1937), 28 U.S.C. § 41 (1) (1940).
[34] 68 Sup. Ct. 641 (1948).

lished in the federal courts. The rule should recognize the declaratory remedy as an adaptable alternative form of relief based upon the exercise of sound discretion controlled by constitutional principles and established rules of policy.

Some difficulty has been experienced by several of the courts on the placing of the burden of proof in declaratory judgment actions. Because of the negative character of many petitions, such as requests for declaration of non-liability, non-infringement etc., and the frequent reversal of the position of the parties, confusion easily has resulted. The majority of the courts, which have had to consider this phase of the problem, however, have adhered strictly to the ordinary rule which places the burden on the party asserting the affirmative of the issue.[35]

Conflicting views are found in cases presenting the question of the burden of proof of allegations of jurisdictional facts. In one case the court held that the party asserting the jurisdiction of the district court had the burden of supporting his allegations of the jurisdictional fact with competent proof when those allegations were challenged.[36] This holding follows the usual rule. However, in another case, in which the defendant denied plaintiff's allegation of diversity of citizenship, which was the basis for the court's jurisdiction, it was held that the defendant had to bear the burden of proof.[37] Such a conflict cannot be resolved.

A more serious problem has presented itself in suits involving declarations of patent infringement. This problem has been epitomized in *Hunt v. Mallinckroot*[38] where the plaintiff, an accused infringer, brought suit for a declaration of both the invalidity of defendant's patent and non-infringement thereof by the plaintiff. The defendant's answer set up a counterclaim for injunction and damages, alleging infringement. The court said: "It would be incumbent upon defendant to offer testimony to substantiate its alle-

[35] Thompson v. B. & O. R. Co., 59 F. Supp. 21 (E.D. Mo. 1945), *modified on other grounds,* 155 F. 2d 767 (C.C.A. 8th 1946), *cert. denied,* 329 U.S. 762 (1946); Angell v. Schram, 109 F. 2d 380 (C.C.A. 6th 1940); Standard Accident Ins. Co. v. Leslie, 55 F. Supp. 134 (E.D. Ill. 1944) (Insurer had burden of proof on issue of waiver by insured of right to refund of unearned premium, insurer filed for declaratory judgment of non-liability); Lumbermen's Mut. Cas. Co. v. McIver, 27 F. Supp. 702 (S.D. Cal. 1939), *aff'd,* 110 F. 2d 323 (C.C.A. 9th 1940), *cert. denied,* 311 U.S. 655 (1940); Pacific Indemnity Co. v. McDonald, 25 F. Supp. 522 (D. Ore. 1938); International Hotel Co. v. Libbey, 158 F. 2d 717 (C.C.A 7th 1946) (Burden or plaintiff though suit for declaration.).

[36] Williams v. Employers Mut. Liability Ins. Co., 131 F. 2d 601 (C.C.A 5th 1942).

[37] Builders & Manufacturers Mut. Cas. Co. v. Paquette, 21 F. Supp 858 (D. Me. 1938).

[38] 72 F. Supp. 865 (E.D. N.Y. 1947).

gations of infringment; failing which it could not recover the decree which it seeks. It follows that the burden of proof upon such issues rests with it." The court in this case relied upon Professor Borchard's statement:[39] "Since as a rule the risk of non-persuasion is on the plaintiff it is not surprising to find that the burden of proof in declaratory actions rests, in a vast majority of cases on the moving party. Yet, as we shall see, the peculiar nature of a suit for a declaration of non-liability may shift the burden to the defendant, the party who originally made the charge or claim, such as patent infringment, which is the basis of the action for declaration of non-liability."

The same question of placing the burden exists in insurance cases in which the insurer petitions for a declaration of non-liability on a disability policy on the ground that the insured was not permanently and totally disabled as claimed. In such a situation the burden of proof was held to rest on the defendant to show the claimed disability.[40] Hence, it is not true that the burden is always on the plaintiff. Where the insurer asked for a declaration of non-liability for double indemnity because the insured did not die accidentally but committed suicide, the court held that the burden of proving operative and affirmative facts was upon him who relied upon them.[41] In this case this meant that the burden of proving accidental death was upon the administrator of the deceased's estate.

Erroneous statements by a court respecting the burden of proof, however, are not always reversible error. Where the issue of the continued disability of the insured was tried by a court without a jury the fact that the judge incorrectly stated that the burden was upon the insurer did not require the reversal of a judgment for the defendants.[42] The court's reason for so holding was grounded on the fact that the judge's opinion and findings of fact indicated that he was firmly convinced that all of the evidence the defendants had offered established the fact that the insured was totally disabled.

The present statute makes specific provision for jury trial of issues of fact. The courts have no quarrel with this provision nor do they encounter difficulty in its application, inasmuch as issues of fact are tried in declaratory actions, as elsewhere, in accordance with the Constitution and the general principles and statutory reg-

[39] BORCHARD, *op cit. supra* note 5 at 404.

[40] Mutual Life Ins. Co. v. Tormohlen, 118 F. 2d 163 (C,C.A. 7th 1941).

[41] Reliance Ins. Co. v. Burgess, 112 F. 2d 234 (C.A.A. 8th 1940), *rehearing denied*, 311 U.S. 730 (1940).

[42] See note 40 *supra*.

ulations governing trial by jury.[43] If the action is of a legal character a jury may be demanded as of right unless waived. Such a verdict is given the full recognition accorded common law verdicts and not treated as purely advisory. On the other hand, the advisory jury of a court of equity may be utilized in a declaratory proceeding which raises equitable factual issues, subject to the same conditions and with like results as an advisory verdict in equity.

The proposed revision[44] of the Judicial Code and Judiciary omits all provisions respecting jury trial. It is believed that this change is without significance for the reason that the rules of procedure which govern the federal courts generally will control in the declaratory judgment procedure, whether mentioned in the statute or not. The change seems a proper one to make; it shortens and simplifies the act.

Professor Borchard has pointed out that one of the evils growing out of patent monopolies was the ability of the patentee to harass alleged infringers with threats of suits. Then, once suit had been brought, and before a trial thereon, he would move to dismiss, leaving the defendant without an adjudication either of non-infringement or of patent validity.[45] After the passage of the Declaratory Judgment Act it was possible for the defendant to file a counterclaim for a declaration on these same issues, thereby avoiding the dangers of plaintiff's voluntary dismissal. The question has arisen in many patent cases as to whether this was a proper technique by which to avoid the continuance of the insecurity produced by a dismissal of the patentee's action. A few cases have held that it was not proper and dismissed the counterclaim along with the main action.[46] But the great weight of authority supports the view that the alleged infringer may secure the determination of the

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[43] Piedmont Fire Ins. Co. v. Aaron, 138 F. 2d 732 (C.C.A. 4th 1943); Hargrove v. American Cent. Ins. Co., 125 F. 2d 225 (C.C.A. 10th 1942); Ryan Distributing Corp. v. Caley, note 24 *supra*; Great Northern Life Ins. Co. v. Vince, note 10 *supra*; Pacific Indemnity Co. v. McDonald, note 35 *supra*.

[44] See introductory paragraphs of this article.

[45] BORCHARD, *op. cit. supra* note 5, at 812, and the numerous cases cited. See also Aralac Inc. v. Hat Corp. of Amer. 166 F. 2d 286, 291 (C.C.A. 3d 1948) ("Prior to the passage of the Federal Declaratory Judgment Act the patentee was the only one in a position to initiate a suit against the alleged infringer or his dealers. An alleged infringer could not sue the patentee for a declaration that the plaintiff was not infringing or that the patent was invalid." The act gives him his place in the sun.).

[46] Oblak v. Armour & Co., 1 F.R.D. 648 (W.D. Mo. 1941). See other cases taking this view in BORCHARD, *op. cit. supra* note 45. (Some commentators consider this a fatal blow to the protection afforded the alleged infringers by the new declaratory procedure.); See 50 HARVARD L. REV. 357 (1936).

issues of infringement and validity of the patent by a proper counterclaim.[47]

A recent case[48] supports this view as follows: "There is a real controversy . . . between the parties here. True they have presented the issue by complaint and answer. But, obviously, upon trial, the District Court may finally dispose of the dispute by finding merely that there has been no infringement, leaving the question of invalidity wholly undetermined. The defendant may not be satisfied with a judgment of non-infringement. It asserts, and must be deemed to have, a substantial interest in the adjudication of non-validity. Clearly, it might file an independent suit seeking a declaratory judgment. Rather than follow this procedure it has interposed, we think with propriety, a counterclaim seeking the same relief. . . . We see no reason why it should not be available to him as a counterclaim when circumstances would have permitted a separate suit." Accordingly, it seems entirely proper, at least in patent cases, to prevent a miscarriage of justice through an exercise by the plaintiff of the power to dismiss the main suit. The test of the sufficiency of a counterclaim is whether the facts pleaded show a need for affirmative relief for the defendant. Where such is the case, an adjudication of the issues presented by the counterclaim declaring the rights of the parties is both necessary and proper.

DISCRETION

In granting or withholding relief under the Declaratory Judgment Act, the district court exercises a discretion not dissimilar to that obtaining in a court of equity. Although the statute does not, in specific terms, grant discretionary authority, Borchard, the draftsman of the federal act who prepared the Senate Committee Report thereon, commenting in his treatise on the absence of such a provision said: "Nor does the fact that the Report of the Judiciary Committee of the Senate makes no direct reference to the discretionary exercise of the power granted by the Federal Act militate against the rule of discretion."[49] He goes on to state that the provision authorizing the exercise of discretion was written into the Uniform Act so it could guide the state courts in its administration, but that a desire to keep the federal act short and concise necessitated the inclusion of only indispensable provisions. Accordingly, although discretion was not specifically mentioned, there was no intention to deny its use. In fact the Committee Note under Fed-

[47] BORCHARD, *op. cit. supra* note 5, at 813.

[48] Trico Products Co. v. Anderson Co., 147 F. 2d 721 (C.C.A. 7th 1945). See also Kohloff v. Ford Motor Co., 29 F. Supp. 843 (D.C. 1939), *aff'd*, 124 F. 2d 1018 (C.C.A. 2d 1941).

[49] BORCHARD, *op. cit. supra* note 5, at 312.

eral Rule 57 expressly provided that the uniform act be a guide for the scope and function of the federal act. This position was fortified by the language in an earlier circuit court decision[50] to the effect that the use of discretion is implied from the fact that the act merely gives the court power to grant the remedy without prescribing the conditions under which it is to be granted. It could hardly be supposed that it was intended that relief should be granted as of course in every case where a controversy existed.

The courts have readily accepted the proposition that the decision to accept jurisdiction of a declaratory judgment case involves an exercise of a sound discretion. As a matter of fact, this policy of the courts was expressed in a recent case: "The discretion to grant or refuse declaratory relief should be liberally exercised to effectuate the purposes of the Declaratory Judgment Act and thereby afford relief from uncertainty and insecurity with respect to rights, status and other legal relations."[51]

Before such discretion may be exercised, however, the proper groundwork for the granting of a declaration must have been laid. This includes both the existence of all jurisdictional and procedural prerequisites[52] of justiciability and the finding by the court that a declaratory judgment will terminate the controversy and serve a useful purpose. Thus the courts' use of discretion has been expanded gradually whenever they have been persuaded of the usefulness of a declaration. This attitude of the courts has been reflected in the change of emphasis from that of form to one of substance and policy, focusing upon the need and desirability of the declaratory judgment.

Any attempt at regulation by rule, standard or criteria of the court's exercise of its discretion is more or less futile because discretion ends where regulation begins. Standards established by a

[50] Aetna Casualty & Surety Co. v. Quarles, 92 F. 2d 321 (C.C.A. 4th 1937).

[51] Lehigh Coal & Nav. Co. v. Central Ry. of N.J., 33 F. Supp. 362, 365 (E.D. Pa. 1940); see also Eccles v. Peoples Bank of Lakewood Village, note 34 *supra*. ("A declaratory judgment, like other forms of equitable relief, should be granted only as a matter of judicial discretion, exercised in the public interest. . . . It is always the duty of the court of equity to strike a proper balance between the needs of the plaintiff and the consequences of giving the required relief.").

[52] Aralac Inc. v. Hat Corporation of Amer., note 45 *supra*, (Murphy, J., "The conditions of the usual action, procedural and substantive, must always be present, namely, the competence or jurisdiction of the court over parties and subject matter, the existence of operative facts justifying the judicial declaration of legal consequences, the assertion against an interested party of rights capable of judicial protection, and a significant legal interest in the moving party to entitle him to invoke a judgment in his behalf.").

court for the determination of the case before it may be inapplicable to the next case under consideration. A test set up by one court is not elevated to the same position of importance by another court in the consideration of a similar fact pattern. Such is the nature of "discretion."

It is possible, however, to list certain criteria most frequently found in court opinions indicative of the sort of considerations which guide them in their decisions: (1) that the declaratory judgment will or will not serve a useful purpose, either because another action is pending between the same parties and involving the same issues, or the declaration would only give a piecemeal determination of the issues, or there is really no actual controversy; (2) that there is involved in such a declaration an interpretation of or an interference with a state law;[53] (3) that the considerations of "convenience, expediency, need, desirability, public interest or policy" are frequently favorable to or against the declaration;[54] (4) that injunctive relief is or is not available;[55] (5) that another remedy is or is not more effective,[56] under the circumstances, or a statutory remedy is provided and has not been exhausted;[57] and (6) utility, rather than necessity, is the proper test.[58] There are other criteria in the cases but this list is sufficient to indicate those most frequently used by the federal courts.

The discretion employed by the courts in the decision of declaratory judgment cases has been described as a judicial discretion hardened by experience into a rule by which it is hoped that arbitrary action may be excluded as fully as possible. At best, however, the personal judgment of the trial court is very much in the decision. For this reason the matter of discretion is subject to review by the circuit court of appeals. Of necessity, therefore, in reviewing the decision of the district court to grant or refuse the declaratory judgment the appellate court must substitute its judgment for that of the lower court, if an abuse of discretion has been found. Such a result is the natural concomitant of a review of this nature. Too much reliance, of course, must not be placed upon the district court's decision, otherwise the declaratory judgment remedy would be abused.[59] For this reason it is desirable

[53] Alabama State Federation of Labor v. McAdory, 325 U.S. 450 (1945).

[54] BORCHARD, *op. cit. supra* note 5.

[55] Sellers v. Johnson, 69 F. Supp. 778 (S.D. Iowa 1946). And see cases cited in notes 29 to 33 *supra.*

[56] Hillsborough Twp., Somerset County, N. J. v. Cromwell, 326 U.S. 620 (1946).

[57] Emmons v. Smitt, 58 F. Supp. 869 (E.D. Mich. 1944), *aff'd,* 149 F. 2d 869 (C.C.A. 6th 1945), *cert. denied,* 326 U.S. 746 (1946).

[58] James v. Alderton Dock Yards, 256 N.Y. 298, 176 N.E. 401 (1931).

[59] Maryland Cas. Co. v. Consumers Finance Service, Inc., 101 F. 2d 514 (C.C.A. 3d 1938).

that a court, basing its determination on the exercise of its discretion, state the reasons which induce its application. Unhappily, too few cases reveal the exact reasons inducing the court's action in this respect. Consequently, it is not surprising that a very small number of cases are reviewed for an abuse of discretion.

DETERMINATION OF THE EXISTENCE OF A CONTROVERSY AND THE EFFECT OF A CHANGE IN CIRCUMSTANCES

As stated above the statutory requisite for a declaratory judgment is the existence of an actual controversy. The requirement is clear and universally recognized but the courts encounter considerable difficulty in its application to certain fact patterns. The difference between an abstract question and an actual controversy is one of degree[60] and opinions differ when a concrete case pattern is presented. Basically, the question is whether the alleged facts present a substantial controversy between the parties having adverse legal interests of such reality and immediacy as to warrant a declaratory judgment. One court thought that the word "actual" in the statute had been construed so liberally that in effect it had been eliminated practically from the statute.[61] But Chief Justice Hughes had previously stated that it was a word of emphasis only.[62]

Professor Borchard has stated the criteria for the guidance of the court in determining whether an actual controversy has been made out by a petition: "The opposition to the plaintiff's demand must come from a source competent legally to jeopardize his right. Where, however, that is conceded, it still remains to determine whether the plaintiff has a sufficient interest, pecuniary or personal, to institute a proceeding worthy of judicial relief. He must show that his rights are in direct issue or jeopardy; and incidental thereto must show that the facts are sufficiently complete, mature, proximate and ripe to place him in gear with his adversary, and thus to warrant the grant of judicial relief. Just when the controversy has reached the stage of maturity cannot be a priori defined."[63] This criterion was approved by Judge Yankwich in a case in which the benefits of the declaratory judgment were allowed "even before a right of action existed or a cause of action accrues."[64]

The application of this rule is necessary in all declaratory ac-

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[60] Crowell v. Baker Oil Tools, 49 F. Supp. 552 (S.D. Cal. 1943), *rev'd on other grounds*, 143 F. 2d 1003 (C.C.A. 9th 1944), *cert. denied*, 323 U.S. 760 (1944).

[61] Dewey & Almy Chemical Co. v. American Anode Inc., 137 F. 2d 68 (C.C.A. 3d 1943), *cert. denied*, 320 U.S. 761 (1943).

[62] Aetna Life Ins .Co. v. Haworth, note 8 *supra*.

[63] BORCHARD, *op. cit. supra* note 5, at 36.

[64] Maryland Cas. Co. v. Hubbard, 22 F. Supp. 697 (S.D. Cal. 1938).

tions, but for the purpose of indicating its difficulties, a sampling of cases has been taken from four classes of cases: patent cases, contract cases, cases involving statutory questions and/or administrative orders, and cases involving contemporary problems of the seniority status of veterans.

In the eleven patent cases selected to illustrate the determination of a justiciable controversy, seven found such to exist and four dismissed the petitions. In one of the cases dismissed, wherein the court found that the proof failed to show any adequate charge of infringement by the owner of the patent, it was held that an actual controversy did not exist until the patentee made some unequivocal claim that his patent had been infringed.[65] A suit for infringement would clearly be sufficient to establish a cause of action for a declaratory judgment. But some question exists whether notice of infringement would suffice. A very liberal view on this point was taken in a case in which the defendant by letter, prior to declaratory judgment suit, stated that plaintiff's advertising seemed to have "many of the ear-marks" of defendant's patent, and asked for further details from which to determine the infringement controversy. This correspondence was prolonged and finally defendant proposed a license to use his patent, stating that the plaintiff's product would infringe his patent. To the plaintiff's suit for a declaration of non-infringement the defendant objected that there was no controversy. The court ruled that simple, informal notice of infringement is sufficient, and that the correspondence was enough. Otherwise, the defendant could "sit back and take no action till the plaintiff had gone to much trouble and expense in making and putting its product on the market."[66] This uncertainty, which the plaintiff must feel, would seem to be precisely the sort of thing the act was intended to resolve by a declaration, and the court was right in finding that a controversy existed.[67]

A case decided the next year, however, is much more exacting in the matter of the sufficiency of the notice. During the war the defendant had permitted the use of certain patents for military and naval purpose without payment of royalties. Plaintiff requested

[65] Thermo-Plastics Corp. v. International Pulverizing Corp., 42 F. Supp. 408 (D. N.J. 1941).

[66] General Electric Co. v. Refrigeration Patents Corp., 65 F. Supp. 75 (W.D. N.Y. 1946).

[67] Accord: U.S. Industrial Chemicals, Inc. v. Carbide & Carbon Chemicals Corp., 49 F. Supp. 345 (S.D. N.Y. 1943), *cert. granted*, 314 U.S. 603 (1941); Petersime Incubator Co. v. Bundy Incubator Co., 43 F. Supp. 446 (S.D. Ohio 1942), *aff'd*, 135 F. 2d 580 (C.C.A. 6th 1943), *appeal dismissed*, 320 U.S. 805 (1943); Chicago Pneumatic Tool Co. v. Ziegler, 151 F. 2d 784 (C.C.A. 3d 1945); Randolph Laboratories Inc. v. Specialties Development Corp., 62 F. Supp. 897 (D. N.J. 1945).

a declaration of non-infringement and alleged that a cause arose by virtue of defendant's advertisements in trade journals which stated, "Now that the war is ended, we hereby give public notice that we expect no use will hereafter be made of any of our patents except by individuals or concerns duly licensed thereunder." Although the court recognized the frequent need for relief from the patent "racket" which the declaratory judgment act afforded and that the liberal construction employed by the federal courts was entirely correct, yet relief was denied.[68] It was decided that where the controversy was based upon notice that it was necessary to establish and follow some "norm," "criteria" or "yardstick" by which the character of the notice might be gauged. This requirement was not satisfied, inasmuch as the advertisement failed to identify any particular patent owned by defendant as being infringed, nor was any particular infringement on the part of the plaintiff identified, nor was any particular product of the defendants indicated as in danger and, finally, no actual infringement was charged by any one. In short, the notice lacked particulars and was inadequate as a basis for an "actual controversy." Likewise, where a patentee gave notice to users of articles made under his patent of the termination of licenses to producers of the product, of whom the plaintiff was one, and that thereafter the patentee would furnish the articles, it was held insufficient notice to support the plaintiff's petition for a declaration of non-infringement.[69] Although the concept of a controversy is somewhat technical, it is believed that these last two cases place an unwarranted limitation on the liberal use of declaratory judgments in an area in which its use should be encouraged and for a reason and with respect to a matter in which a more liberal view would not endanger the property of patent holders nor create an abuse of the declaratory remedy.

During the period of the war emergency, often at the suggestion of a government official, declaratory judgment actions were not pressed, although an actual controversy existed, in order to avoid interference with war production. For example, at the request of the Secretary of the Navy a petition for a declaration of patent infringement was dismissed. Since the emergency relative to war production has passed, such actions have been permitted, indicating that a cause did exist.[70] Similarly, covenants not to sue for patent infringement, accepted on the recommendation of the Petroleum

[68] Federal Telephone & Radio Corp. v. Associated Tel. & Tel. Co., 71 F. Supp. 877 (D. Del. 1947).

[69] Hart v. Recordgraph Corp., 73 F. Supp. 146 (D. Del. 1947).

[70] Crosley Corp. v. Hazeltine Corp., 66 F. Supp. 893 (D. Del. 1946), *rev'd on other grounds*, 122 F. 2d 925 (C.C.A. 3d 1941).

Coordinator, ended with war termination and the revocation of recommendation.[71] Thereafter, declaratory suits were sustained.

Thus, both liberal and conservative attitudes can be seen in the application of the rule in patent cases.

Contract cases reveal the same diversity of attitude in the federal courts in the matter of the determination of the existence of an actual controversy. In a case which seems to go to the verge of the law, but is believed to be correctly decided, the plaintiff and the defendant were parties to a contract by which they embarked upon a house construction adventure in which they were to share profits and losses. Defendant repudiated the entire contract and denied liability for accrued losses. Plaintiff petitioned for a declaration that the contract was valid, that the agreement consisted of several divisible contracts and that suits for losses already incurred would not bar subsequent suits for future losses, which the petition alleged would be incurred. The court sustained the action on the ground that the request was for an adjudication of plaintiff's rights on existing facts and not for an advisory opinion on hypothetical facts contingent on future events.[72] Likewise, a request for a declaration that the award of a construction contract be restrained or, if awarded, that further proceedings thereunder be prohibited, was entertained, the court finding an actual controversy rather than a moot question because the contract was so nearly completed.[73] This liberal view is reflected in cases in which there is far less doubt than in the two cases discussed where the decision was so close.[74]

On March 15, 1948 the United States Supreme Court handed down a decision in the case of *Eccles v. Peoples Bank of Lakewood Village, Cal.*,[75] which is particularly startling in the light of the view just presented. The Bank in this case had been granted membership in the Federal Reserve System. A condition was imposed for the purpose of protecting the Bank's independence, however, by which the Board of Governors was empowered to withdraw the membership if the Trans-American Corporation, a powerful bank holding corporation, acquired an interest in the Bank without the approval of the Board. The Trans-American Corporation did acquire 540 of the 5000 shares of the Bank. The Board found, however, after investigation, that this acquisition of shares was a mere investment,

[71] Phillips Petroleum Co. v. Shell Development Co., 64 F. Supp. 806 (D. Del. 1946).

[72] Dunleer v. Minter Homes Corp., 33 F. Supp. 242 (S.D. W. Va. 1940).

[73] Walter P. Villere Co. v. Blinn, 156 F. 2d 914 (C.C.A. 5th 1946).

[74] Humphrey v. U. S. Fidelity & Guaranty Co., 38 F. Supp. 224 (D. Ore. 1940); Lehigh Coal & Navigation Co. v. Central RR. of N.J., 33 F. Supp. 362 (E.D. Pa. 1940); Phillips Petroleum Co. v. Shell Development Co., note 71 *supra*.

[75] See note 51 *supra*.

that the independence of the Bank was undisturbed, and, accordingly, disavowed any intention of revoking the membership because of the condition broken. The Bank filed a petition in the district court for a declaration that the condition imposed was illegal, unwarranted and ultra vires and asked that it be cancelled. The district court, in line with the liberal view, sustained the petition and ruled that an actual controversy was presented.[76] The Bank's need for a declaration was thus dramatically expressed: "In view of the events that have transpired, the condition hangs over the bank like the sword of Damocles ready to strike whenever the Board of Governors chooses to wield the weapon at its command. In the words of Mr. Justice Douglas in Altvater v. Freeman, 319 U. S. 359, 365 . . . It was the function of the Declaratory Judgment Act to afford relief against such peril and insecurity." The District Court further stated that plaintiff was not posing a hypothetical question and that until the validity of the condition was decided, great uncertainty and insecurity would perplex the plaintiff in all its business plans for the future. It was concluded that "To say that no actual controversy exists between the parties is not realistic." The circuit court of appeals[77] affirmed the district court, one judge dissenting, on the ground that an actual controversy existed. These decisions were reversed by the Supreme Court in a five to two decision, two justices dissenting and two not participating.

After pointing out that a declaratory judgment was a matter of judicial discretion exercised in the public interest, Mr. Justice Frankfurter, who wrote the opinion of the court, said "Courts should not intervene unless the need for equitable relief is clear, not remote or speculative." The court indicated that the Bank's rights were secure unless its independence were lost, and the Board of Directors changed its policy and the Federal Depositors' Insurance Corporation discontinued its policy, which events were thought to be unlikely. The opinion continued: "The occurrence of these contingent events, necessary for injury to be realized is too speculative to warrant anticipatory judicial determination. Courts should avoid passing on questions of public law even short of constitutionality that are not immediately pressing. . . . As we have seen, the Bank's grievance here is too remote and insubstantial, too speculative in nature, to justify an injunction against the Board of Governors, and therefore, equally inappropriate for a declaration of rights." This controversy was held not yet ripe for a declaratory judgment and it was ruled that the lower courts should have dismissed the petition.

[76] 64 F. Supp. 811 (D. D.C. 1946).
[77] 161 F. 2d 636 (App. D.C. 1947).

Justices Reed and Burton dissented for reasons similar to those announced by the lower courts. It was thought important that the Board of Governors had in no way manifested an intent never to impose the condition. Justice Reed declared: "Certainly, as I see it, there is not only the possibility of future injury but a present injury by reason of the threat to the marketability of respondent's stock. . . . It requires no elaboration to convince me that the threat is a real and substantial interference by allegedly illegal governmental action."

It is believed that there was an actual controversy presented by the Bank's petition which was ripe for a declaration. An alleged illegal power in an administrative tribunal which creates uncertainties and disturbs the petitioner's rights should come before the court as readily as a similar unlawful action on the part of a private person. Indeed, the facts seemed peculiarly suited to declaratory treatment by which the uncertainties could be removed without further coercive procedure.

The conflict in the cases on the question of the existence of an actual controversy where statutory provisions are involved seems even sharper and more irreconcilable than in the patent and contract cases. In a case where labor difficulties arose between sugar producers and their employees because of conflicting contentions with regard to the applicability of the wages and hour provisions of an Act of Congress, it was held that a justiciable controversy existed and a declaratory judgment petition was proper to determine whether Congress intended to exempt such employees from the act.[78] But, contrariwise, it was held that a justiciable controversy did not exist for the purpose of determining whether an Act of Congress which prohibited the plaintiff, a corporation created under the act, from engaging in the insurance business also prevented its owning stock in companies engaged in such business.[79] Since the defendant had threatened to bring suit to revoke the plaintiff's certificate of incorporation because of its ownership of said stock, it seems very clear that a ripe controversy existed. One judge dissented on this ground from the opinion of the court dismissing the petition. It is difficult to understand why, in a question of the applicability of a statute which was present in both cases, one court should recognize the existence of a controversy while the other did not.

In *Connecticut Importing Co. v. Perkins*,[80] a wholesaler filed a petition for a declaratory judgment against the Secretary of Labor,

[78] Bowie v. Gonzalez, 117 F. 2d 11 (C.C.A. 1st 1941).

[79] Smith v. American Asiatic Underwriters, 127 F. 2d 754 (C.C.A. 9th 1942), *approved*, 134 F. 2d 233 (1943).

[80] 35 F. Supp. 414 (D. Conn. 1940).

Administrator of the Wage and Hour Division of the Department of Labor, the State Commissioner of Labor and U. S. District Attorney for Connecticut, respecting the applicability of the Fair Labor Standards Act to his employees. The petition alleged that the Wages and Hours Division of the Department of Labor had published an "Interpretative Bulletin" in which it was declared that wholesalers buying goods from outside their state should comply with the act. The petition further stated that the defendants had investigated the problem and told the plaintiff that he was engaged in interstate commerce and liable for the penalties imposed for the violation of the act. It was held that the petition presented no justiciable controversy because the defendants lacked the authority to prosecute the wholesaler for failure to comply with the act. This seems a very questionable decision but certainly the following statement by the court is unwarranted: "Nor can I find in the complaint unequivocal allegation that the District Attorney has threatened to prosecute the plaintiff, or indeed has taken any definite position in the premises." It seems preferable to assume that the prosecutor would perform his duty if the plaintiff violated the statute and that the unanimous character of the advice received, that the act did apply to him, was sufficient to create a controversy which a declaration could finally resolve.

Where a regional director of the wage and hour law informed an employer that the latter's practices were violating the act and must cease, and further stated that he was designated by employees to start proceedings, an actual controversy existed which justified a declaratory proceeding.[81] There are many cases where similar factors obtain in which a liberal attitude is manifested by the courts.[82]

Seniority rights were created by the United States Selective Service Act by which an employee taken into the armed services, upon honorable discharge therefrom, was entitled to be restored to his former position with full seniority privileges. Union labor contracts made during the war and the period of scarcity of labor likewise contained seniority provisions. It was inevitable that conflicts and issues difficult of solution would arise out of this situation for veterans, civilian employees, employers and the courts. Several cases in which attempts were made to settle such issues by declaratory judgments have been selected as representative of the problem.

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[81] A. H. Belo Corp. v. Street, 35 F. Supp. 430 (N.D. Tex. 1940), *cert. granted*, 314 U.S. 601 (1941).

[82] Roloff v. Perdue, 33 F. Supp. 513 (N.D. Iowa 1940); Kentucky Natural Gas Corp. v. Public Service Comm., 28 F. Supp. 509 (E.D. Ky. 1939), *aff'd*, 119 F. 2d 417 (C.C.A. 6th 1941); Mester v. U.S., 70 F. Supp. 118 (E.D. N.Y. 1947), *aff'd*, 68 S. Ct. 70 (1948).

In two of these cases relief was denied, evidencing an attitude opposed to a liberal use of declaratory judgment action.

In the *Nemenz* case[83] the court took jurisdiction and entered a declaration petitioned for by an employer. The employer here was faced with a dilemma: either (1) to adopt a policy favoring the veteran employee in conformity with the compulsory provisions of the Selective Service Act and nullify the union contracts made with non-veteran employees, or (2) to proceed on the principle that the binding force of the union contract was unaffected by the Selective Service Act. He did not have jobs for both groups of employees, and between them he was neutral. Suits were threatened. Consequently, both veteran and non-veteran employees who made demands upon him were joined as parties to the declaratory judgment action. It was held that these facts presented an actual controversy and that the court had jurisdiction. (The declaration, incidentally, gave preference to the veteran.) It would be difficult to find a fact pattern more suited to this type of remedy. The court stated that: "It definitely was the intention of the Federal Declaratory Judgment Act and Rule 57 of the Federal Rules of Civil Procedure that a matter of this nature would be governed thereby." It was a justiciable controversy and not hypothetical or advisory in character.

Nevertheless, in a later case decided the same year, and involving similar facts, the court dismissed the petition of the employer.[84] He had sued first on the basis of the Selective Service Act but later amended the petition, and proceeded under the declaratory judgment act. The court ruled that the relief asked was the same and denied it upon the ground that under the Selective Service Act jurisdiction was conferred only "upon the filing of a motion, petition or other appropriate pleading by the person entitled to the benefits of such provisions," such benefits having been reserved exclusively to returned veterans. It is submitted that such a narrow view tends to undermine the very purpose of the declaratory judgment act. Although the plaintiff misconceived his remedy initially, nevertheless, when he brought suit under the declaratory judgment act to determine a fact controversy growing out of and involving the Selective Service Act, the refusal of the courts to appreciate the existence of a controversy and retain jurisdiction is strange indeed. The *Nemenz* case presents the sounder view.

Even when a veteran has brought an action to have declared his seniority rights under the Selective Service Act, the courts have been unduly conservative in their interpretation of the facts and

[83] Lord Mfg. Co. v. Nemenz, 65 F. Supp. 711 (W.D. Pa. 1946).

[84] Trailmobile Co. v. International Union, 67 F. Supp. 53 (S.D. Ohio 1946).

technical in laying down requirements essential to a good pleading of these facts. Thus, the court refused jurisdiction because of the non-existence of a controversy where the plaintiff alleged no more than that defendant's business was falling off and that since more and more drivers, of which the plaintiff was one, were being put on an "extra board," he might be seriously injured by a delay in determining his seniority status.[85] These allegations were held insufficient. Of course the court is correct in its position that "If the plaintiff is merely in doubt as to his rights under the statute, without having had them challenged, the case is premature and not properly the subject of a declaratory judgment." However, threats to rights are sufficient to set a declaratory action in motion. Thus, where the attorney of the employer declared that they had more drivers than could be used, and that conditions were growing worse, such an admission by the defendant would seem to necessitate the finding of an immediacy of danger sufficient to justify the use of declaratory procedure. Although this admission was not pleaded, the court doubted its sufficiency even if included. The court then proceeded to outline the essentials of the pleadings in such a case. Facts, it said, should have been pleaded showing threatened loss of employment as a result of the denial of plaintiff's claimed seniority; or allegations should have been made that other employees wrongfully claimed seniority superior to that of the plaintiff; that a lay-off of employees was imminent and that irreparable loss would be suffered unless the seniority rights were established. A liberal construction of the petition would have found some of these essentials, enough it is believed, to make a case.

Declaratory relief is to a considerable extent anticipatory, often permitted prior to the existence of a cause of action for a wrong, a point ignored by the court. A complaint should be upheld if the danger is certain and definite, and it is believed it was so in this case. The court may have been entirely right in its position, however, that there was a failure to join all the necessary parties. In retrospect, however, it can be seen that the utility of declaratory relief has been considerably hampered in this area of seniority rights.

In general, it may be said that the attitude taken by the individual courts conditions, to a large extent, the finding by the court that a controversy exists between the parties to an action before it. The standard is broad — "that a controversy exists." Hence, there is room for interpretation, and the liberal or the narrow view of each court, therefore, is determinative of its findings.

When the circumstances giving rise to a controversy have

[85] Johnson v. Interstate Transit Lines, 163 F. 2d 125 (C.C.A. 10th 1947).

been changed by events subsequent to the institution of suit so as to negative to a large extent the existence of a controversy, most of the courts have held that such an alteration in the fact pattern does not necessarily render the case moot. This is so because there are usually some issues left requiring solution which would justify the retention of the case and a final, regular, judicial disposal of it. Exception to this is, of course, found in those instances where the controversy has been completely resolved and the plaintiff is willing to dismiss.

Patent cases wherein a patentee has charged the plaintiff with infringement and threatened suit therefor afford the best examples of this problem. These cases[86] have usually followed this sequence of events: (1) suit brought by the accused infringer for a declaration of invalidity and non-infringement, and (2) a subsequent conclusion and statement by the defendant to such suit that the plaintiff's device is not an infringement. In such situations it has been held that the actual controversy over validity and infringement still existed. One court expressed its opinion on such a turn of events thus, "If the defendant were permitted to change his mind on the question of infringement after this action was commenced, and avoid a judgment on the issue of validity, nothing would prevent a switch again to the conclusion that the plaintiff was infringing after the action was dismissed."[87] Thus, once a controversy has arisen, the defendant cannot withdraw his claim of infringement and defeat a declaration. The plaintiff is vitally interested in procuring a declaration of validity.[88] So too, the fact that the plaintiff's plant was closed at the time defendant secured his patent and notified the plaintiff that operations by the latter would infringe his patent did not prevent a declaration of invalidity or non-infringement where the plaintiff intended to reopen his plant.[89]

A contrary view is found in *McCurrach v. Cheney Brothers.*[90] There the court's jurisdiction of an action to declare defendant's patent invalid and not infringed by the plaintiff was denied because

[86] Water Hammer Arrester Corp. v. Tower, 66 F. Supp. 732 (E.D. Wis. 1944), *cert. denied*, 329 U.S. 806 (1947), *rehearing denied*, 330 U.S. 853 (1947); White v. Bruce Co., 62 F. Supp. 577 (D. Del. 1945), *aff'd*, 162 F. 2d 304 (C.C.A. 3d 1947); Sinclair & Carroll Co. v. Interchemical Corp., 325 U.S. 327 (1945).

[87] Water Hammer Arrester Corp. v. Tower, note 86 *supra*.

[88] White v. Bruce Co., note 86 *supra*; Sinclair & Carroll Co. v. Interchemical Co., note 86 *supra* (Where patent suits arise the better practice is for court to inquire fully into validity thereof.).

[89] U. S. Industrial Chemical Inc., v. Carbide & Carbon Corp., 67 F. Supp. 895 (S.D. N.Y. 1946).

[90] 152 F. 2d 365 (C.C.A. 2d 1945).

"at the trial the defendant expressly disclaimed any claim that the plaintiff infringed its patent, and there was no room thereafter for a declaratory judgment as to invalidity." The concurring judge was unwilling to rest the decision on the vague abstraction of jurisdiction, which is an unwise limitation on this useful remedial device, and suggested, instead, that it rest on "grounds of discretion and lack of utility." This, it is true, is less objectionable. Notwithstanding, it would seem that a mere declaration by a defendant of his change of mind would rarely call for the dismissal of an action in the exercise of a sound discretion because, as indicated above, there are still controversies and uncertainties existing which should keep the case on the docket until a declaration has settled them.

Another illustration of the rule is found in a case of a declaratory judgment and injunction proceeding against a School Board for discriminatory practices in fixing salary schedules for white and colored teachers.[91] The subsequent adjustment of salaries by the Board did not deprive the court of jurisdiction, although it did cause postponement of the injunction, inasmuch as the court was doubtful whether the deep-seated discriminatory "policy, custom and usage" complained of had been abandoned.

Similarly, the voluntary discontinuance of alleged violations of the Fair Labor Standards Act did not deprive the court of jurisdiction of a suit for the declaration of violation and infringement.[92] The danger of future violations suggested the advisability of a present declaration.

Jurisdictional Amount in Controversy

The requirements established by law for the assumption of jurisdiction over a case or controversy by the federal courts exist alike for declaratory judgment suits and for the conventional actions. Thus, jurisdiction on the ground of diversity of citizenship[93] presents no problem in declaratory judgment actions not found in other suits. But since the law has been settled that a request for a declaration of non-liability or non-coverage constitutes a controversy, several suits involving insurance contracts have raised the question of the sufficiency of the jurisdictional amount involved and the factors to be considered in determining such amount.

There is practical unanimity in the view that, where the action does not bring into question the validity of the policy, and the

[91] Morris (Hibbler, Intervener) v. Williams, 149 F. 2d 703 (C.C.A. 8th 1945). And *see* Thompson v. Gibbes, 60 F. Supp. 872 (E.D. S.C. 1945).

[92] Walling v. Alaska Pacific Consol. Min. Co., 152 F. 2d 812 (C.C.A. 9th 1945), *cert. denied*, 327 U.S. 803 (1946) ("Voluntary discontinuance of an alleged illegal activity does not operate to remove a case from the ambit of judicial power.").

[93] 28 U.S.C.A. § 41 (1940).

declaration is limited to disability or accident liability, that only benefits which have already accrued to the insured under the policy may be considered for purposes of satisfying the jurisdictional requirement.[94] In the *Greenfield* case,[95] where a declaration was sought respecting the company's liability for disability payments, it was contended that future benefit payments based upon the insured's life expectancy plus the reserve which the company was required by law to maintain, in addition to the amount of the premiums that would be waived, could all be combined to make up the required jurisdictional amount. This was denied. The court refused to consider more than the amounts already accrued for the reason that the disability complained of might be terminated at any time. Hence, since the amount of accrued benefits recoverable at the time of suit was only $515.35 plus a reasonable attorney's fee, the jurisdictional requirement of an amount in controversy exceeding $3,000 was not satisfied and jurisdiction over the controversy by the federal court was refused. Similarly, in the *Fowles* case,[96] where the insured was seeking a declaration as to his disability benefit rights, he wished to add to accrued benefits, admittedly inadequate, the right to future benefits. Only accrued benefits were allowed and the suit failed because, as the judge said, "Obviously no right to such 'future benefits' existed at the time action was commenced. No one, at that time, knew or could have known whether such a right would ever exist. Therefore, as to such 'future benefits,' there was and could have been, at that time, no controversy."

An apparently inconsistent view is taken by the *Kortz* case.[97] The language of the opinion seems to indicate a consideration of the anticipated future benefits to be paid in addition to those already accrued. In that case the amount of the accrued benefits of which the insurance company sought to be relieved exceeded $3,000. That alone would have been sufficient to satisfy the jurisdictional amount required. In spite of that, the Circuit Court continued: "Moreover, the controversy involves more than alleged liability for matured installments. The Insurance Company seeks an adjudication that will relieve it from both matured and future disability payments. Since Kortz's life expectancy is 11.68 years, the amount involved, exclusive of interest and costs, is far in excess of $3,000." It is the quoted

[94] Travelers Ins. Co. v. Greenfield, 154 F. 2d 950 (C.C.A. 5th 1946); N. Y. Life Ins. Co. v. Greenfield, 154 F. 2d 953 (C.C.A. 5th 1946); Commercial Cas. Ins. Co. v. Fowles, 154 F. 2d 884 (C.C.A. 9th 1946); Mutual Life Ins. Co. v. Moyle, 116 F. 2d 434 (C.C.A. 4th 1940); Travelers Ins. Co. v. Wechsler, 34 F. Supp. 717 (S.D. Fla. 1940).

[95] Travelers Ins. Co. v. Greenfield, note 94 *supra*.

[96] See note 94 *supra*.

[97] Guardian Life Ins. Co. of Amer. v. Kortz, 151 F. 2d 582 (C.C.A. 10th 1945).

language above which raises the question of the existence of a conflict on the issue of including future benefits in the computation of the amount in controversy. Although dictum, it might mistakenly be considered authoritative.

Not infrequently an insurer petitions for a declaratory judgment to establish the existence or absence of a duty under the policy to defend a suit brought by an injured party against the insured. No question respecting the validity of the policy is involved in such an action, but a suit of this nature poses a difficult question of evaluating the duty to defend. It has been held that the fact that the amount of recovery which might be realized is presently undetermined does not defeat jurisdiction[98] if the possibility of the insurer's liability exceeds $3000.[99] This is so regardless of the amount of the claim being made under the policy. Other courts have held that the jurisdictional amount is not the face of the policy but the expense of defending the suit.[100] A better criterion would seem to be the maximum liability under the policy to which the insurer might be subjected.[101] It is quite clear that the amount demanded by the injured party is not material.[102]

There is a suggestion of a more liberal policy in *Stoner v. New York Life Insurance Company*.[103] The company sought a declaration of its non-liability on a disability policy and a cessation of its duty to waive further premium payments. It was held that under the circumstances of the case a declaratory judgment could not be entered, but that it was proper to deny insured's motion to dismiss for want of the necessary amount in controversy "since a judgment in favor of respondent would determine petitioner's claim to both benefit payments and waiver of premiums." The latter, therefore, could seemingly be added to accrued benefits to make up the jurisdictional amount. This is a future element. The holding of the district court in *Travelers Insurance Company v. Wechsler*[104] indicates that similar consideration might be given by the courts to factors of a less immediate character. There the court said "*in the absence of an admission* that the insured has a total and permanent

[98] American General Ins. Co. v. Booze, 146 F. 2d 329 (C.C.A. 9th 1944); Trinity Universal Ins. Co. v. Woody, 47 F. Supp. 327 (D. N.J. 1942).

[99] Travelers Ins. Co. v. Young, 18 F. Supp. 450 (D. N.J. 1937).

[100] See Standard Accident Ins. Co. v. Alexander, 23 F. Supp. 807 (N.D. Tex. 1938), *aff'd*, 103 F. 2d 500 (C.C.A. 5th 1939); State Farm Mut. Auto Ins. Co. v. Hugee, 32 F. Supp. 665 (E.D. S.C. 1940), *aff'd*, 115 F. 2d 298 (C.C.A. 4th 1940).

[101] Trinity Universal Ins. Co. v. Woody, note 98 *supra*.

[102] Commercial Casualty Ins. Co. v. Humphrey, 13 F. Supp. 174 (S.D. Tex. 1935); C. E. Carnes & Co. v. Employers' Liability Assur, Corp., 101 F. 2d 739 (C.C.A. 5th 1939).

[103] 311 U.S. 464 (1940), *rehearing denied*, 312 U.S. 713 (1941).

[104] 34 F. Supp. 717 (S.D. Fla. 1940).

disability,—the amount of the disability benefits of the policy could not be computed according to the age and life expectancy of the insured so as to reveal an amount in controversy in excess of $3000." This language also carries the implication that if the pleadings showed an admission of permanent disability, future benefits, based on life expectancy, could be counted in computing the jurisdictional amount. Thus this and the *Stoner* and *Kortz* cases, *supra*, bring under the scrutiny of the courts elements which, in the strict sense of words, are not in immediate controversy but of future concern.

Where the declaratory judgment petition puts in issue the validity of the policy itself, as in a request for a declaration of non-coverage of the policy or non-liability of the insurer, the rule is well-settled that the jurisdictional amount in controversy is the face value of the policy.[105] Consequently, it may be seen that the distinction between those cases which do not attack the validity of the policy and those which do is significant.[106] Furthermore, where several insurers have a common interest arising from the coverage of the same risk, it is sometimes possible to combine the face values of several policies issued by these different insurers to determine the amount in controversy.[107]

The same rule obtains in contracts other than insurance contracts. The jurisdictional amount is determined by the value of the contract. The fact situations can not be categorized as neatly as the numerous insurance cases, but a careful analysis will disclose the use of the same rule, *i.e.* the value of the contract.[108]

The declaratory judgment procedure is sometimes used to se-

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[105] Home Ins. Co. of N.Y. v. Trotter, 130 F. 2d 800 (C.C.A. 8th 1942); Stephenson v. Equitable Life Assur. Soc. of U.S., 92 F. 2d 406 (C.C.A. 4th 1937) (Unpaid disability benefits cannot be considered in determining jurisdictional amounts.); Builders and Manufacturers Mut. Casualty Co. v. Paquette, 21 F. Supp. 858 (S.D. Me. 1938); New Century Casualty Co. v. Chase, 39 F. Supp. 768 (D. W. Va. 1941) (Allegation of jurisdictional amount in controversy is taken as true if not denied in the answer.).

[106] Mutual Life Ins. Co. v. Moyle, 116 F. 2d 434 (C.C.A. 4th 1940) (Excellent opinion by Judge Parker.).

[107] Firemen's Fund Ins. Co. v. Crandall Horse Co., 47 F. Supp. 78 (W.D. N.Y. 1942) (Each policy contained a pro rata liability clause.).

[108] Davis v. American Foundry Equipment Co., 94 F. 2d 441 (C.C.A. 7th 1938) (Value of the contract exceeded $3000 although present recovery was less. Jurisdictional requirement satisfied.); American Type Founders v. Lanston Monotype Mach. Co., 45 F. Supp. 531 (E.D. Pa. 1942), *aff'd*, 137 F. 2d 728 (C.C.A. 3d 1943) (Present accrued royalties satisfied requirement. Future rights could be considered.); Corcoran v. Royal Development Co., 121 F. 2d 957 (C.C.A. 2d 1941), *cert. denied*, 314 U.S. 691 (1941) (Holder of participating contracts issued by a corporation seeks declaration of rights to be paid prior to shareholders. Aggregate amount of such contracts constitutes the jurisdictional amount, but such was only $1400 and jurisdiction was denied.)

cure a declaration of the validity, construction, or application of a statute. Here, as elsewhere, the jurisdictional requirements must be met. Accordingly, where a foreign corporation filed a complaint for a declaration that a statute of Florida was inapplicable to it, it was alleged that the value of its right to do business in that state, unregulated, was in excess of $3000. The jurisdictional amount was satisfactorily established.[109] Similarly, where the State of Wyoming sought the construction of a Federal statute which it alleged was depriving the state of revenues in excess of $3000, the court retained the case.[110] On the other hand, where the plaintiff failed to register under the Selective Service Act and sought a declaration and injunction against criminal prosecution therefor, alleging damages to him greatly in excess of $3000, including loss of salary, loss of consortium and pleasures of home, it was held that such items were not properly determinative of the jurisdictional amount.[111]

Where the petitioner in a declaratory judgment proceeding sued for himself and "all persons similarly situated," it was held that the jurisdictional amount must be satisfied by computations based upon the petitioner's rights alone, as he was the only party. The value of the rights of the others may not be included.[112]

Another Pending Action

In numereous cases a petition for a declaratory judgment is filed in a district court when a suit is already pending in another federal or in a state court. As elsewhere, the general criterion set up by the courts themselves as determinative of their assumption of jurisdiction is whether the declaratory remedy will serve a useful purpose. Where a suit for a declaration is brought after an action has been instituted in another court, at least four additional, self-imposed considerations present themselves as tests for the taking of jurisdiction of the later action. The criteria which the courts follow are these: (1) are the same issues involved in both suits; (2) are the same parties involved in both actions; (3) is there an equal facility for the trial of the issues in the first action as in the declaratory judgment action; and (4) is the declaratory action brought for the bona fide purpose of determining the controversy or merely to anticipate defenses and enable the defendant to select the tribunal.

As simple of application as these criteria appear to be on their face, discrepancies exist therein. Thus, the courts do not agree

[109] United Enterprises v. Dubey, 128 F. 2d 843 (C.C.A. 5th 1942), *cert. denied*, 317 U.S. 669 (1942).

[110] State of Wyoming v. Franke, 58 F. Supp. 890, (D. Wyo. 1945).

[111] Stone v. Christensen, 36 F. Supp. 739 (D. Ore. 1940).

[112] Southern Pac. Co. v. McAdoo, 82 F. 2d 121 (C.C.A. 9th 1936).

upon what constitutes the "same issue." This is particularly evident in insurance and patent cases.

Cases in many jurisdictions treat an action by an insurer for a declaratory judgment to determine his rights and obligations under an insurance policy or to declare the termination or cancellation of the policy as one which involves issues separate and distinct from those arising in pending suits against the insured by a third party for personal injuries.[113] Thus, the courts have distinguished the actions on the ground that either: the issue in the state personal injury action was that of liability under specific circumstances while that in the federal suit was the status of the policy as void ab initio;[114] or that the liability of the insured was at issue in the state court whereas the extent of the insurer's liability was the concern of the declaratory action;[115] or that the suit by the administrator of the injured party's estate against the administrator of insured's estate did not present the issues of whether proper notice had been given the insurer and whether the insurer was under a duty to defend the state court action.[116] One court, faced with a similar problem, held that the pendency of an action in a state court which involved some of the transactions implicit in the declaratory judgment suit did not deprive the District Court of jurisdiction of the insurer's suit unless the *identical* issues were before the state court.[117]

In conflict with these decisions is the case of *American Automobile Insurance Company v. Freundt*[118] where the court refused jurisdiction of a declaratory judgment suit brought by an insurer to determine his obligations and liabilities under the policy while the injured party was pursuing a judgment obtained in a state court against the insured by filing garnishment proceedings against the insurer. Jurisdiction over the declaratory action was refused on the ground that the question could be adjudicated in the pending

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[113] American General Ins. Co. v. Booze, 146 F. 2d 329 (C.C.A. 9th 1944); Associated Indemnity Corp. v. Davis, 136 F. 2d 71 (C.C.A. 3d 1943); Associated Indemnity Corp. v. Garrow Co., 39 F. Supp. 100 (S.D. N.Y. 1941), *aff'd*, 125 F. 2d 462 (C.C.A. 2d 1942); General Acc. Fire & Life Assur. Corp., Ltd. v. Morgan, 33 F. Supp. 190 (W.D. N.Y. 1940); American Motorists Ins. Co. v. Busch, 22 F. Supp. 72 (S.D. Cal. 1938); Builders & Manufacturers Mut. Casualty Co. v. Paquette, 21 F. Supp. 858 (D. Me. 1938).

[114] Builders & Manufacturers Mut. Casualty Co. v. Paquette, note 113 *supra*.

[115] Associated Indemnity Corp. v. Davis, note 113 *supra*.

[116] General Acc. Fire & Life Assur. Corp. v. Morgan, note 113 *supra*.

[117] American Motorists Ins. Co. v. Busch, note 113 *supra*.

[118] 103 F. 2d 613 (C.C.A. 7th 1939).

state court suit, the court relying heavily on its discretionary powers to entertain or refuse jurisdiction in such a situation.[119]

Other insurance cases present similar problems. Thus, in one case the court held that a suit brought by an insurer against his insured in a state court to cancel the policy and recover benefits paid out to the insured thereunder presented different issues from those involved in a federal action instituted the same day by the insured against his insurer to affirm the validity of the policy.[120] Likewise, the circuit court of appeals held in *Guardian Life Insurance Company of America v. Kortz*[121] that the pendency of an action in the state court, brought by the insured to recover unpaid disability benefits, did not bar the assumption of jurisdiction by the federal court over an action by the insurer seeking to be relieved of both accrued and future liability for disability benefits. Here the court stated: "The causes of action asserted are not the same. In the state court actions, Kortz seeks recovery of accrued disability benefits. In the declaratory judgment actions, the insurance company seeks an adjudication that the contract is terminated and seeks relief from matured, as well as future, liability for disability benefits." However, the court in this case goes farther: "Moreover, the state court actions and the declaratory judgment actions are in personam. It is well settled that where two actions involving the same cause of action are pending in a state and a federal court, and are within the concurrent jurisdiction of each, both actions, insofar as they seek relief in personam, may proceed at the same time and when one action has gone to final judgment may be set up as a bar in the other action under the doctrine of res judicata." And then, "The question should be resolved by a determination of whether there is such a plain, adequate, speedy remedy afforded by the insurance company in the pending state court actions that a declaratory judgment will serve no useful purpose." The language of the court on this aspect of the matter is very disturbing. Certainly a major problem faced by the courts, where two suits are pending between the same parties, is the avoidance of a multiplicity of suits. Consequently, this attitude of the court, to let the suit first decided act as res judicata for the one still pending, is alarming. However, there seems to be room for such a practice under the law as it stands, for Federal Rule 57 of the Rules of Civil Procedure states: "An action for a declaratory judgment, if otherwise appropriate, should not be dismissed merely on the ground that another remedy is available,

[119] Ohio Casualty Ins. Co. v. Marr, 21 F. Supp. 217 (N.D. Okl. 1937), *aff'd*, 98 F. 2d 973 (C.C.A. 10th 1938), *cert. denied*, 305 U.S. 652 (1938).

[120] Rydstrom v. Mass. Accident Co., 25 F. Supp. 359 (D. Md. 1938).

[121] See note 97 *supra*.

nor because of the pendency of another suit, if the issues in the declaratory action will not necessarily be determined in that suit."

Similarly, the courts are in conflict where two cases involving patent issues between the same parties are pending in different courts. Actions for patent infringement are distinguished by some of the courts from actions for the declaration of the validity of a patent. Other cases hold that there is a similarity between the issues which precludes an adjudication by the second court. Thus, where the state court action was based upon unfair competition, the district court declared that such a suit did not warrant a conclusion that no controversy over the validity and infringement of the patents existed, which latter points were the subject of suit instituted in the federal court.[122] So too, where defendants sued for infringement of their patents in one proceeding, claiming plaintiff was its licensee and that the license agreement was valid and subsisting, such an action was held not to bar a declaratory action brought by the plaintiffs which raised questions under the patent statutes exclusively within the jurisdiction of the federal courts, notwithstanding that each action raised substantially the same issues.[123]

Conversely, however, where plaintiff sued for patent infringement by the defendant, defendant's answer thereto, asking a declaration on the validity of the patent in question was dismissed, the court holding that the validity question would be determined as an incident to the infringement adjudication and that no useful purpose could be served by entering a declaration on the validity of the patent.[124]

Generally speaking, the courts have little difficulty in interpreting and applying the test that declaratory actions will not be entertained where the same parties to one action are the parties to the suit for a declaration. On a few occasions, however, the courts have been bothered by its application to a particular fact pattern. Especially has this been so where a parent corporation and its wholly-owned subsidiary are concerned.[125]

In one case the subsidiary brought an action in one district court to declare its prior right to the use of a trademark and to enjoin defendant's infringement thereof. Shortly thereafter, defendant sued both parent and subsidiary in another district court alleging infringement by them. Thereupon, the parent corporation

[122] Pomerantz v. Jean Vivaudou Co., 65 F. Supp. 948 (S.D. N.Y. 1946).

[123] Lionel Corp. v. De Filippis, 11 F. Supp. 712 (E.D. N.Y. 1935).

[124] Cheney Co. v. Cunningham, 29 F. Supp. 847 (W.D. Pa. 1939).

[125] Cresta Blanca Wine Co. Inc., v. Eastern Wine Corp., 143 F. 2d 1012 (C.C.A. 2d 1944); Zenith Radio Corp. v. Dictograph Products Co., 66 F. Supp. 473 (D. Del. 1946).

sought leave to intervene in the first action and moved to stay the second action until entry of a final judgment in the first. The court, refusing leave to the parent to intervene, granted the requested stay of prosecution of the second action against the subsidiary alone pending final disposition of the first suit, saying there was no abuse of discretion in denying a stay of defendant's action against the parent corporation inasmuch as the parent corporation was not a party to the first suit and "the duty to enjoin the prosecution of a proceeding later instituted in another federal district arises only if the controversy in each court involves the same issues and the same parties."[126]

A decision which indicates the court's practical approach to the problem in which a parent and wholly-owned subsidiary were involved was *Zenith Radio Corporation v. Dictograph Products Company.*[127] There the court refused to restrain the prosecution of the later-instituted action against the parent until the prior suit terminated in a decree, inasmuch as the earlier suit was considered insufficiently developed for the court to determine that the parent corporation was undertaking the defense of its subsidiary in such action. Accordingly, the court, after finding the existence of all elements requisite to the rendition of a declaratory judgment, refrained from acting thereon because "the question remains whether the present case and the New York case are between the same parties."

A third consideration adopted by the courts as a test for the assumption of jurisdiction of a declaratory judgment action where another action is pending is the availability of an equal facility of trial of the issues in the first action as in the second.[128] "Facility" has been variously described by the courts to include such things as the nature of the defenses available, the convenience of the parties and of the witnesses, the adequacy of the remedies afforded, the position of the case on the docket and the cost of litigation.

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[126] Cresta Blanca Wine Co. v. Eastern Wine Corp., note 125 *supra.*

[127] See note 125 *supra.*

[128] Carbide & Carbon Chemicals Corp. v. U.S. Industrial Chemicals, 140 F. 2d 47 (C.C.A. 4th 1944); Guardian Life Ins. Co. of America v. Kortz, note 97 *supra*; Western Electric Co. v. Hammond, 135 F. 2d 283 (C.C.A. 1st 1943); Crosley Corp. v. Westinghouse Electric & Mfg. Co., 130 F. 2d 474 (C.C.A. 3d 1942), *cert. denied*, 317 U.S. 681 (1942); Aetna Casualty & Surety Co. v. Quarles, 92 F. 2d 321 (C.C.A. 4th 1937); N. Y. Life Ins. Co. v. Roe, 22 F. Supp. 1000 (W.D. Ark. 1938), *rev'd on other grounds*, 102 F 2d 28 (C.C.A. 8th 1939); Staley Elevator Co. v. Otis Elevator Co., 35 F. Supp. 778 (D. N.J. 1940); Greer v. Scearce, 53 F. Supp. 807 (W.D. Mo. 1944); American Tel. & Tel. Co. v. Henderson, 63 F. Supp. 347 (N.D. Ga. 1945); Buffalo Creek Co-op State Grazing Dist. v. Anderson, 72 F. Supp. 330 (D. Mont. 1947).

Thus the Supreme Court of the United States depicted the factors to be considered by the courts by its dicta in the often-quoted *Brillhart v. Excess Insurance Company* case:[129] "Ordinarily it would be uneconomical as well as vexatious, for a federal court to proceed in a declaratory judgment suit where another suit is pending in a state court presenting the same issues, not governed by federal law, between the same parties. Gratuitous interference with the orderly and comprehensive disposition of a state court litigation should be avoided .... Where a district court is presented with a claim such as was made here, it should ascertain whether the questions in controversy between the parties to the federal suit, and which are not foreclosed under the applicable substantive law, can better be settled in the proceeding pending in the state court. This may entail inquiry into the scope of the pending state court proceeding and the nature of defenses open there. The federal court may have to consider whether the claims of all parties in interest can satisfactorily be adjudicated in that proceeding, whether necessary parties have been joined, whether such parties are amenable to process in that proceding, etc... This was a matter for determination, certainly, in the first instance by the District Court."

The prohibition against the use of declaratory judgment procedure as a device to anticipate trial of an issue in a court of coordinate jurisdiction[130] or as a means of determining the validity of a defense[131] has been frequently voiced by the courts. Similarly, they have decried the abuse of declaratory procedure by defendants who have attempted to employ it as a tool to select the tribunal before which they prefer to appear.

Because of the nature of the problems involved and the fact that the discretion of the court plays such a large part in their solution, little more can be said respecting the cases discussed above. The decision is not an easy and clear-cut one for the trial court. It may be ventured that a reading of these cases leaves one with an uneasy feeling that a judge who desires to restrict the use of declaratory judgments may utilize this discretionary power as a means of achieving that purpose. There is more indication of this in the earlier cases under the Act than in those of recent years. Such an impression has been produced by the increasing numbers of courts which have, with slight variation, indulged in the blanket general-

[129] 316 U.S. 491 (1942) (The same criticism on basis of economy can be made of the *Kortz* case, note 97 *supra.*).

[130] Carbide & Carbon Chemicals Corp. v. U. S Industrial Chemicals, note 128 *supra.*

[131] Aetna Casualty & Surety Co. v. Yeatts, 99 F. 2d 665 (C.C.A. 4th 1938).

ization that: "The pendency of another action is not enough to defeat the jurisdiction of a federal court whose jurisdiction has been properly invoked."[132]

EXHAUSTION OF SPECIAL STATUTORY REMEDIES

Where, by legislation, special tribunals, commissions or administrative boards have been set up and procedural routines established, courts of general jurisdiction have refrained from encroaching upon this special jurisdiction through the declaratory judgment device. A very persuasive reason for this attitude has been that a great deal of technical factual investigation is incident to the work of these quasi-judicial bodies and that they have become experts especially equipped for the work. But this should not be taken to mean that the administrative method in such cases is necessarily exclusive, nor that this aspect of the problem is just a rehashing of the problem of the establishment of the alternative character of the remedy.[133] Rather, it is a consideration of those controversies for which a specific remedy has been provided by statute, despite the existence of which, different relief, in the form of a declaratory judgment, has been asked. Some of the courts, it is found, have required the parties to follow the statutory procedure, while others have permitted the parties the use of the declaratory technique.

In general, it may be said, that the discretion of the court adjudicating upon the issues plays a large part in the determination of the matter. As Professor Borchard has said: "If the question is one of law or of the jurisdiction of the commission it may be judicial economy and wisdom to decide the issue by declaration before the administrative channel has been invoked or exhausted."[134] The usual criterion followed by the courts in deciding whether to retain or dismiss petitions for declaratory judgments, however, is whether the remedy alternative to declaratory relief is an adequate one, that is, whether it is "plain, speedy and efficient."

For the sake of clarity of analysis, the various cases considered herein have been subdivided according to the substantive fields of law indicated by their fact situations. The categories, therefore, are those of tax cases, cases involving contract rights, citizenship disputes, racial and/or religious discrimination controversies, problems involving the constitutionality or validity of a statute or administra-

[132] Ohio Casualty Ins. Co. v. Marr, note 119 *supra*; Greer v. Scearce, note 128 *supra*; Guardian Life Ins. Co. of America v. Kortz, note 97 *supra*; Crosley Corp. v. Westinghouse Electric & Mfg. Co., note 128 *supra*; U. S. Fidelity & Guaranty Co. v. Koch, 102 F. 2d 288 (C.C.A. 3d 1939).

[133] See "Nature of the Remedy" *supra*, page 212.

[134] BORCHARD, *op. cit. supra* note 5, at 344.

tive order, corporate problems and problems involving federal administrative agencies.

It has always been a delicate question when a federal court has been asked to interfere with the fiscal policy of a state. An Act of Congress has provided that jurisdiction will not lie in "any suit to enjoin, suspend, or restrain the assessment, levy or collection of any tax imposed by or pursuant to the laws of any state where a plain, speedy and efficient remedy may be had at law or in equity in the courts of such state."[135] While there has been some question,[136] it is now well settled that the Declaratory Judgment Act is included in this restrictive legislation.[137] While a great majority of the petitions for a declaratory judgment in tax cases were denied because special tax tribunals existed in the states and because the special remedy provided was considered "plain, speedy and efficient,"[138] several cases retained jurisdiction and granted a declaration.[139] Where the state law provided a means for recovering taxes paid, the remedy was considered sufficient.[140]

However, decisions which have followed the "plain, speedy and efficient" standard indicate considerable variance in interpretation. For example, in *Bucklin Coal Mining* case,[141] upon the plaintiff's assertion that the state procedure was inadequate because it did not provide for an injunction pending final adjudication and required four hearings as compared with two under the Federal Declaratory

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[135] Johnson Act. 28 U.S.C.A. §41 (1) (1937).

[136] Morrison-Knudsen Co. v. State Board of Equalization, 35 F. Supp. 553 (D. Wyo. 1940).

[137] West Publishing Co. v. McColgan, 46 F. Supp. 163 (N.D. Cal. 1942), *aff'd*, 1938 F. 2d 320 (C.C.A. 9th 1943); BORCHARD, *op. cit. supra* note 5, at 808.

[138] West Publishing Co. v. McColgan, *supra* note 137; Miller v. City of Greenville, 138 F. 2d 712 (C.C.A. 8th 1943); Inland Milling Co. v. Huston, 11 F. Supp. 813 (S.D. Iowa 1935); Selser v. City of Stuart, 135 F. 2d 211, (C.C.A. 5th 1943), *cert. denied*, 320 U.S. 769 (1943); (Quo warranto was only proper remedy as attack on tax levy was attack on city's corporate existence.); Great Lakes Dredge & Dock Co. v. Huffman 319 U.S. 293 (1943); Paul Smith Construction Co. v. Buscaglia, 140 F. 2d 900 (C.C.A. 1st 1944); Bucklin Coal Mining Co. v. Unemployment Comm., 53 F. Supp. 484 (W.D. Mo. 1943); Collier Advertising Service v. City of N.Y., 32 F. Supp. 870 (S.D. N.Y. 1940).

[139] Township of Hillsborough v. Cromwell, 326 U.S. 620 (1946); Morrison-Knudsen Co. v. State Board of Equalization, *supra note* 136; Texas Electric Ry. v. Eastus, 25 F. Supp. 825 (N.D. Tex. 1938), *aff'd*, 308 U.S. 512 (1939), *rehearing denied*, 308 U.S. 637 (1939); Spector Motor Service v. McLaughlin, 323 U.S. 101 (1944); U.S. v. Query, 37 F. Supp. 972 (E.D. S.C. 1941), *aff'd*, 121 F. 2d 631 (C.C.A. 4th 1941), *cert. denied*, 314 U.S. 685 (1941), *vacated on other grounds*, 316 U.S. 653 (1942), *vacated on other grounds*, 316 U.S. 486 (1942).

[140] Miller v. City of Greenville, *supra* note 138.

[141] See note 138 *supra*.

Judgment Act and because the matter of supersedeas was left entirely to the commission, the court dismissed the petition, declaring that the state procedure met the standard. On the other hand, in the *Hillsborough* case,[142] the state remedy was held inadequate and the petition retained. The court said, "We have held where a federal constitutional question turns upon the interpretation of local law and the local law is in doubt, the proper procedure is for the federal court to hold the case until a definite determination of the local law can be made by the state courts . . . . In the present case it appears that the respondent's opportunity to appeal to the State Board of Tax Appeals had expired before the District Court ruled on the motion to dismiss. And it is not clear that today respondent has open an adequate remedy in the New Jersey Courts for challenging the assessments on local law grounds." Thus, in spite of the policy against interference with state taxes, the federal court did retain jurisdiction for a declaratory judgment.

In *Selser v. City of Stuart*[143] the court did not apply the standard usually used but seemed to hold that, since the suit "was a collateral attack upon the City of Stuart," quo warranto was the exclusive remedy. This was not a suit to enjoin the collection of taxes—but was thought to go much further. This decision is open to question, however, on the ground that it tends to subvert the alternative character of the declaratory judgment remedy.

The construction of contracts and the determination of rights thereunder has been peculiarly within the scope of the declaratory judgment act. Where, however, the contract was the result of collective bargaining and administrative tribunals had been created to administer the relationships growing out of such contracts, the problem of exhaustion of those administrative remedies as a prerequisite to the assumption of jurisdiction of a declaratory action has been vividly presented. The decisions in cases of this nature have been in sharpest conflict. Disagreement has existed where the issue presented was one involving general rights under the contract or where it concerned matters of internal relationship, and whether a proceeding was pending before an administrative tribunal.

In *Texoma Natural Gas Company v. Oil Workers International Union*[144] a declaratory judgment suit was filed to determine the issue of seniority rights of employees. Although no proceeding before the National Labor Relations Board had begun, objection

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[142] See note 139 *supra.*

[143] See note 138 *supra.* See also Morin v. City of Stuart, 111 F. 2d 773 (C.C.A. 5th, 1940).

[144] 58 F. Supp. 132 (N.D. Tex. 1943), *aff'd*, 146 F. 2d 62 (C.C.A. 5th 1944), *cert. denied*, 324 U.S. 872 (1945), *rehearing denied*, 325 U.S. 893 (1945).

was made to the propriety of the action of the district court in taking jurisdiction when the administrative remedy had not been exhausted The court maintained that the Declaratory Judgment Act should be liberally construed, that the existence of another remedy did not affect the court's jurisdiction under Rule 57, and, therefore, retained the petition. Affirming this decision, the Circuit Court of Appeals said, "An employer may establish the seniority rights of an employee . . . as well as general rights which their contract relationship establishes, without waiting to be sued for breach or for damages or for specific performance, and thus secure the 'interpretation of the contract during its actual operation' and stabilize an 'uncertain and disputed relation.' Exhaustion of the administrative remedies . . . is not a prerequisite to the bringing of a court action by either party for an alleged violation by the other of a labor agreement."

Likewise, jurisdiction was accepted even where the National Labor Relations Board had issued its directive.[145] The court was not deprived of jurisdiction over a contract reached by collective bargaining because "The National War Labor Board is not, under law, vested with judicial functions . . . It is not a substitute for the courts, and the pendency of a controversy before it is not a bar to a suit in the courts." Furthermore, its directives were only advisory. Eleven days prior to this decision the *Worthington Pump and Machinery* case,[146] which is weakly distinguished in this case as presenting "jurisdictional difficulties . . . lacking here," held against jurisdiction for a declaratory judgment on very broad policy considerations. The issue was pending before the N.L.R.B. The judge recognized that there had been cases which retained the petition for a declaration of rights but thought that "this court should be reluctant to allow itself to be invited into that field of controversy unless the parties have proceeded in accordance with the national policy that is embodied in the Norris-LaGuardia Act." He continued, "I am persuaded that in the ordinary case, unless there has been a complete exhaustion of administrative remedies, there ought to be great reluctance on the part of the Federal Court to interfere to construe a labor agreement." The policy of the Norris-LaGuardia Act was to limit injunctive interference by courts of equity and secure administrative determination of issues more suited to such process. Hence, it is arguable that the declaratory judgment proceeding might violate this policy.

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[145] American Brake Shoe Co. v. Grybas, 63 F. Supp. 414 (D. Mass. 1945), *quoting* Texoma Natural Gas Co. v. Oil Workers International Union, Note 144 *supra.*

[146] Worthington Pump and Machine Corp. v. Local No. 259, 63 F. Supp. 411 (D. Mass. 1945).

Another type of problem involves internal organizational matters, respecting which the same conflict has existed. Where an employer was required to adopt a policy of employment which gave preference either to the seniority provisions of the National Selective Service Act or to conflicting clauses in its union contract, and having been threatened with suit in either event, it was held that a declaratory judgment petition would be retained by the court.[147] On the other hand, where a dispute arose as to the distribution of work between two divisions of a railroad, which precipitated a labor controversy between groups in the same union, the court dismissed a petition by the employees for a declaration. The reason given for its rejection of the action was a refusal to disturb fifteen years of collective bargaining experience between the parties involved.[148] Again, where the controversy was between the employees and two different railroads over the distribution of work at terminals, and the employees belonged to the same union, although the District Court retained jurisdiction of the employer's action, the Circuit Court of Appeals reversed the decision.[149] The opinion of the appellate court manifested an extreme reluctance on the part of the court to enter into what it conceived of as an internal dispute and a desire to leave such disputes to an administrative tribunal.

A similar problem has arisen in cases involving state public utility commissions. Although Congress has denied the federal district courts the jurisdiction to enjoin, suspend or restrain the enforcement of orders affecting public utility rates fixed by state commissions, it was held that the restriction was not applicable to a petition which sought a declaratory judgment to determine the rights of a public utility under a contract with a city to furnish gas.[150]

Where declaratory actions have been brought to determine controversies involving matters of citizenship, the courts, again, are in conflict as to the necessity of exhaustion of the special statutory procedure. Thus, in one case the District Court declined to make a declaration of citizenship in a deportation case in which it was urged that the order was unwarranted and the act unconstitu-

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[147] Lord Mfg. Co. v. Nemenz, 65 F. Supp. 711 (W.D. Pa. 1946).

[148] Gaskill v. Roth, 151 F. 2d 366 (C.C.A. 8th 1945), *cert. denied*, 327 U.S. 798 (1946), *rehearing denied*, 328 U.S. 876 (1946).

[149] Texas & P. Ry. v. Brotherhood of R.R. Trainmen, 60 F. Supp. 263, (W.D. La. 1945), 63 F. Supp. 640 (W.D. La. 1945), *rev'd*, 159 F. 2d 822 (C.A.A. 5th 1947), *cert. denied*, 68 S. Ct. 62 (1947) (Decision on the merits which followed the denial of defendant's motion to dismiss the petition was impliedly overruled by the reversal of judgment by the circuit court of appeals on defendant's motion in the first instance.)

[150] Mississippi Power & Light Co. v. City of Jackson, 116 F. 2d 924 (C.C.A. 5th 1941), *cert. denied*, 312 U.S. 698 (1941).

tional.[151] The court required that the statutory remedy be exhausted as a condition to jurisdiction, inasmuch as the statute itself stipulated that the naturalization of aliens occur "under the conditions prescribed in this chapter, and not otherwise."[152]

Yet, in a case where the Attorney General was following the regular procedure to secure the cancellation of a duplicate certificate of naturalization because the original court record of the naturalization proceeding had been lost, the District Court retained the case to give a declaration. It found jurisdiction, despite the statutory provisions established, when one was denied the rights and privileges of citizenship.[153] Here the exhaustion of statutory procedures was not considered obligatory.

CONSTITUTIONALTY AND VALIDITY

There is a conflict in the cases in which declaratory judgments have been sought prior to the exhaustion of special remedies provided by law to determine the constitutionality, validity or applicability of statutes or administrative and executive orders. A case illustrative of the court's assumption of jurisdiction is that of *Texas Electric Railway v. Eastus*[154] where an interurban railroad sought a declaration, as against the United States Attorney and the Collector of Internal Revenue, that the Tax Act and the Railway Labor Act were not applicable to it. The court retained the case although such a controversy fell within the jurisdiction of the Interstate Commerce Commission and no proceedings had been brought before that tribunal. Similarly, the court took jurisdiction of a proceeding brought to declare the validity of an executive order of the President which directed the Secretary of War to take possession of and operate plaintiff's plant and facilities, and to determine the rights and status of the plaintiff company. The District Court held the matter for its consideration despite the fact that the War Labor Board had not been approached to determine the issue.[155]

Conversely, however, an application for a declaration respecting the validity of a tax due under the Social Security Act and an in-

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[151] Citizens Protective League v. Clark, 155 F. 2d 290 (App. D.C. 1946), *cert. denied*, 329 U.S. 787 (1946).

[152] 8 U.S.C.A. §701.

[153] Brassert v. Biddle, 148 F. 2d 134 (C.C.A. 2d 1945); Ginn v. Biddle, 60 F. Supp. 530 (E.D. Pa. 1945).

[154] Note 139 *supra*. See also Hudson & Manhattan Ry. v. Hardy, 22 F. Supp. 105 (S.D. N.Y. 1938).

[155] U.S. v. Montgomery Ward, 58 F. Supp. 408 (N.D. Ill. 1945), *rev'd on other grounds*, 150 F. 2d 369 (C.C.A. 7th 1945); *cert. denied*, 324 U.S. 858 (1945), *rehearing denied*, 324 U.S. 888 (1945), *vacated*, 326 U.S. 690 (1945) (This decision reversed prior decision because the cause was moot.)

junction against its collection was dismissed because "the plaintiffs have a plain, adequate and complete remedy at law."[156]

Where no provision had been made in the statute for an appeal from the decision of a special tribunal established therein, it was held that the District Court could properly retain a declaratory judgment petition. This decision was the outcome of an action brought by a federal civil service employee charged with political activity by the Commission which had issued an order for his removal pursuant to Civil Service Rule and the Hatch Act, neither of which provided for administrative or statutory review. In his petition for a judgment declaring the invalidity of the order, plaintiff alleged the omission of a procedure for review and the absence of any case precedent for such review. "Under such circumstances," said the court, "we see no reason why a declaratory judgment action, even though constitutional issues are involved, does not lie."[157]

Racial discrimination and interference with religious freedom raise federal constitutional questions for the settlement of which declaratory judgment proceedings have been brought in the federal courts. The reasons for retaining or denying jurisdiction are not entirely harmonious. Where a colored teacher sought a declaration of rights against alleged discrimination in salary, as contrasted with the wages paid white teachers, it was held that it was not a prerequisite to jurisdiction that the procedures set up by state law were exhausted. The law provided for a hearing before the County Board of Education with appeal to State Board of Education and additional appeal to Common Pleas Court and thence to Supreme Court. Although convenience of determination of the state remedy did not control, the court did think that the existence of the federal constitutional question secured jurisdiction in the federal court and that a state, by statute, could not restrict the court's jurisdiction.[158]

Likewise, in cases where the registrar of elections refused to register negro voters and the state law provided for appeal to the state courts, which procedures had not been exhausted, the District Court retained the petition for a declaration of rights. The reason given by the courts was that the remedy established was judicial in character rather than administrative.[159] This would seem to suggest

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[156] Aponaug Mfg. Co. v. Fly, 17 F. Supp. 944 (S.D. Miss. 1937), *aff'd*, 87 F. 2d 997 (C.C.A. 5th 1937).

[157] United Public Workers of America (C.I.O.) v. Mitchell, 330 U.S. 75 (1947).

[158] Thompson v. Gibbes, 60 F. Supp. 872 (E.D.S.C. 1945).

[159] Hall v. Nagel, 154 F. 2d 931 (C.C.A. 5th 1946); Mitchell v. Wright, 154 F. 2d 924 (C.C.A. 5th 1946), *cert. denied*, 329 U.S. 733 (1946).

that if the remedies set up by the state statutes were administrative, an exhaustion thereof would be a prerequisite to the jurisdiction of a district court over a declaratory action, while a remedy of a purely judicial character would not have to be pursued.

In contrast to these race discrimination cases is one involving religious freedom. Jehovah's Witnesses sought a declaration to the effect that several city ordinances which prohibited certain of their practices were unconstitutional.[160] The court refused to take jurisdiction on the ground that to do so would deprive the state courts of their right to determine the meaning, applicability and validity of city ordinances subject only to review by the United States Supreme Court. This solicitude for state authority is contrary to the change in federal jurisdiction urged by the *Thompson* case, *i.e.*, the requirement of an exhaustion of state remedies.

The reliance upon various criteria, the existence of a federal constitutional question, the relative convenience of adjudication at the state level, and the necessity for exhaustion of an administrative remedy as contrasted with judicial relief which need not be exhausted, manifest some confusion in the courts on basic reasons.

The frequent desire and need of business men for an opinion respecting the application to them of administrative regulations and their liability for a violation thereof, has led to a federal movement to supply such advice through the administrative agencies themselves.[161] The obvious purpose is to remove peril and risk, in fact, to accomplish in another form what may be achieved by a declaratory judgment. However, uncertainties have arisen respecting the effect of this device, and the provision therefor, upon the jurisdiction of the federal courts to give declaratory judgments where problems exist as to the decision handed down by the agencies.

The problem has arisen first in respect to the extent of the authority of the administrative agency in question and, once more, there is some conflict in the decisions. Where the parties to a contract agreed to submit certain matters to arbitration and a controversy arose over the scope of the arbitration agreement, although it was urged that the plaintiff's interests would be amply protected by the control of arbitration growing out of the Federal Arbitration Act[162] the district court held that its jurisditcion was not disturbed by the fact that the arbitration device was not exhausted.[163] It should be observed, however, that the court reiterated the fact that eventually it would be required to decide the facts in the issue

[160] Whisler v. City of West Plains, 137 F. 2d 938 (C.C.A. 8th 1943).

[161] BORCHARD, *op. cit. supra* note 5, at 919.

[162] 9 U.S.C.A. §§1-15, Judicial Code §274 d; 28 U.S.C.A. 400.

[163] Lehigh Coal & Navigation Co. v. Central Ry., 33 F. Supp. 362 (E.D. Pa. 1940).

and the present was as good a time as any. On the other hand, a manufacturer who desired to ship poppy seed dyed blue in interstate commerce, fearing that such an act would violate the Federal Food, Drug and Cosmetic Act,[164] made inquiry thereon of the Commissioner of Food and Drugs, as provided by law. On being told that such action on his part would violate the law, he filed a petition for a declaratory judgment in the District Court as to the correctness of the administrator's position, which suit was dismissed.[165] The court declared that mere fears did not make a controversy: "The Supreme Court has said the pronouncements, policies and programs of a government agency do not give rise to a justiciable controversy, save as they have fruition in action of definite and concrete character .... To permit suits for declaratory judgments upon mere informal, advisory, administrative opinions might well discourage the practice of giving such opinions, with a net loss of far greater proportions to the average citizen than any possible gain which might accrue." No opinion is ventured on the policy argument, but it is believed that a real uncertainty perplexed the plaintiff and that a declaratory judgment would have served a useful purpose. Certainly, district courts should be permitted a discretion in such cases. A similar holding obtained in a case in which an administrative official refused to act.[166]

Shortcomings in the adminstrative procedure, including the inadequacy of the administrative remedy, present another problem for consideration. Accordingly, because the "directives of the National War Labor Board are merely advisory," the court allowed a declaratory judgment even though the administrative remedy had not been pursued. It was further pointed out that "The latter (N.L.R.B.) has no power to create rights or determine legal liability. It can enforce its directives only by imposing sanctions for failure to follow 'advice.' "[167] The absence of any judicial power in the N.L.R.B. has made the existence of administrative procedures no bar to a declaratory judgment when the issue required a judicial procedure. The absence of a regular review procedure has also been held to be a defect so serious as to justify a resort in the first instance to a declaratory judgment proceeding.[168]

Cases have developed in which the plaintiff denied that the issue raised in the declaratory judgment action fell within the scope of authority of the administrative tribunal for the jurisdiction of

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[164] 21 U.S.C.A. 371e.

[165] Helco Products Co. v. McNutt, 137 F. 2d 681 (App. D.C. 1943).

[166] Cook Chocolate Co. v. Miller, 72 F. Supp. 573 (D.D.C. 1947).

[167] American Brake Shoe Co. v. Grybos, note 145 *supra.*

[168] Gordon v. Bowles, 153 F. 2d 614 (Em. App. 1946), *cert. denied,* 328 U.S. 858 (1946); Texoma Natural Gas Co. v. Oil Workers International Union, *supra* note 145. (There were no "teeth" in the Board's directives.)

which the opposing party contended. These positions are illustrated by *Sunshine Mining Company v. Carver*,[169] where the Wage and Hour Division of the Labor Department urged that the plaintiff's mining business was being conducted in violation of the Fair Labor Standards Act, while the plaintiff contended that his actions were not within the act because he was not engaged in interstate commerce. In that case it was held that he did not have to wait indefinitely to be prosecuted before the commissioner under the cloud of the claim, but was free to seek a declaratory judgment in the district court. Similarly, where the plaintiff sought to enjoin the enforcement of the Renegotiation Act by the Maritime Commission as applied to his charter parties with the British Ministry, it was held that the issue could be determined by a declaratory judgment. Such a judgment was considered appropriate to settle the jurisdictional uncertainty, interfering in no way with the statutory administrative plan. Rather, the court thought that a declaratory judgment would settle the jurisdictional question in the only forum in which it could be settled, at least at that stage of the proceedings, ending the controversy if decided favorably to the plaintiff, and, if decided adversely to him, it would leave the commission, and, if need be, the Tax Court, free to consider the merits.[170] The dissenting judge contended that this decision was squarely contrary to the *Helco Products Company* case[171] which is noted above.

Thirdly, these special statutory administrative remedies have often presented the old question of alternative remedy. Is the declaratory judgment an alternative remedy respecting these? It seems pretty clear that it is not, although there is some conflict in the decisions. In some cases the courts have retained the petition for a declaratory judgment regardless of the jurisdiction existing in the several administrative agencies involved.[172] But where the statutory procedure was made the exclusive remedy, a declaratory judgment was denied.[173] And a declaratory remedy was denied also where the issue was a matter of admission to the bar of a

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[169] 41 F. Supp. 60 (D. Idaho 1941).

[170] Waterman S.S. Corp. v. Land, Chairman, Maritime Comm., 151 F. 2d 292, (App. D.C. 1945), *rev'd*, 327 U.S. 540, (1946), *dismissed*, 327 U.S. 765 (1946), *cert. granted*, 326 U.S. 709 (1945).

[171] Note 165, *supra*.

[172] Adams v. N.Y.C. R.R., 121 F. 2d 808 (C.C.A. 7th 1941) (Seniority rights adjudicated despite existing administrative remedy); Texoma Natural Gas Co. v. Oil Workers International Union, *supra* note 145 (Exhaustion of administrative remedy not a prerequisite); Lord Mfg. Co. v. Nemenz, *supra* note 147.

[173] Citizens Protective League v. Clark, 155 F. 2d 290 (App. D.C. 1946), *cert. denied*, 329 U.S. 787 (1946) (A naturalization case); Bata Shoe Co. v. Perkins, 33 F. Supp. 508 (D.D.C. 1940) (An alien deportation case).

state,[174] or disbursement,[175] because the issue was considered wholly a state matter and of such character as to leave no question for a federal court to determine. The issues involved were federal rights and privileges over which the state had complete control.

The decisions in this category do not present a very well defined pattern. This may be because of the close bearing of the alternative remedy doctrine which obtains very definitely in the federal cases and also because of the discretionary element always present in the granting of declaratory judgments.

Effect on Contingent Interests of Determination of Controversy

Courts have shown their recognition of the great ability of the declaratory technique in the solution of cases of actual controversy, by extending it to the determination of an increasing number of factual situations which vary from the usual type of cases. A fine illustration of this expansion in the declaratory judgment procedure is found in its application to the determination of controversies involving contingent interests. Although the courts might seem to be treading on the dangerous ground of attempting to solve controversies which, though "actual" are not of "immediate" concern, yet, the results are satisfactory and amply supported by sound reason.

Where a life insurance company brought an action against both a life and a contingent beneficiary for a judgment to declare its liability for accidental death benefits, the court rejected the argument of the contingent beneficiary that, because of the nature of her interest, she should not then be called upon to defend in the action.[176] Although the court recognized some validity in her contentions, it disposed of them by saying that countervailing reasons pointed to a different conclusion. "To hold a person whose interest is contingent may not be compelled to defend an action for a declaratory judgment would greatly diminish the field and lessen the utility of declaratory judgment actions. The purpose of the declaratory judgment action is to settle actual controversies before they have ripened into violations of law or legal duty or breach of contractual obligations." The court drew an analogy between the interests of the contingent beneficiary in the case at bar and the contingent claim of an injured third party in a declaratory action to establish non-liability under casualty insurance.

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[174] Starr v. State Board of Law Examiners of Indiana, 159 F. 2d 305 (C.C.A. 7th 1947), *cert. denied*, 331 U.S. 830 (1947).

[175] Emmons v. Smitt, 58 F. Supp. 869 (E.D. Mich. 1944).

[176] Franklin Life Ins. Co. v. Johnson, 157 F. 2d 653 (C.C.A. 10th 1946). See also American Machine & Metals, Inc. v. De Bothezat Impeller Co., 166 F. 2d 535 (C.C.A. 2d 1948).

If allowed in the latter instance, the court could see no reason for not granting a declaratory judgment in the case at bar. "In our case, the interest of both beneficiaries arises out of the same contract and is governed by the same occurrences. The questions of law and fact relating to liability under the policy are common to both. If, therefore, [the contingent beneficiary] is not a necessary and indispensable party, she is assuredly an interested and proper party to the declaratory action. . . . One of the prime purposes of the Declaratory Judgment Act is to meet situations of this kind."

Similarly, the benefits of the act have extended protection to the interests of the parties which are jeopardized or challenged even before the cause of action has accrued.[177]

Since the federal act makes no mention of parties, this matter is governed by the general law.[178] However, the question of the propriety of granting a declaratory judgment has arisen where one of the interests involved in an action is that of a person yet unborn. Unborn children were the contingent beneficiaries under an insurance policy. An action was brought by the insured, his beneficiary, the remainder man and contingent remainderman, to have the loan rights under the policy declared. The court allowed the action despite the absence of the unborn children as parties, holding such a situation to be an exception to the rule of "indispensable parties."[179]

CONCLUSION

In the years immediately following the passage of the Federal Declaratory Judgment Act the courts were occupied in establishing the basic concepts and procedures under the act. They were concerned with interpretations of "actual controversy," the "alternativeness" of the remedy and the status of the jury in actions brought to secure declarations of rights. Once these principles were established, an ever increasing number of litigants instituted suits for declaratory judgments instead of petitioning for the traditional forms of coercive relief. Although the act was silent on the matter, the courts early recognized that the determination of the presence of the prerequisites for the rendition of a declaratory judgment was a matter of judicial discretion. It is this exercise of discretion which accounts for the many conflicts existing in the cases today.

Because of the important part played by the discretionary element, few significant conclusions can be drawn from a study of the

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[177] Maryland Casualty Co. v. Hubbard, 22 F. Supp. 697 (S.D. Cal. 1938).

[178] Federal Rules of Civil Procedure 19 and 20.

[179] Webster v. State Mut. Life Assur. Co., 50 F. Supp. 11 (S.D. Cal. 1943), *modified on other grounds*, 148 F. 2d 315 (C.C.A. 9th 1945).

cases. They do not fall into well-defined patterns. Rather, they must be studied and analyzed individually. Even then, the extent to which a case is authoritative in the decision of the next new, though similar, fact situation, is not predictable. The one conclusion that can be drawn, however, is that more and more courts and litigants have recognized the advantages of this non-coercive form of relief, and that it is readily available as a really alternative remedy. They have proved so satisfactory in so many situations that the occasional reluctance of a court to favor the rendition of a declaratory judgment is surprising. If litigants are satisfied to have their rights and duties declared without the necessity of additional coercive relief, the courts should be ready to respond.